

2011

American Home Systems v. Cambria Homeowners Association : Brief of Appellant

Utah Court of Appeals

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Cole Cannon; Cannon Law Group, PLLC; Attorney for Appellee.

Justin D. Heideman; Travis Larsen; Heideman, McKay, Heugly & Olsen, L.L.C; Attorneys for Appellant.

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IN THE UTAH COURT OF APPEALS

AMERICAN HOME SYSTEMS, LLC, dba
WHY'RD, a Utah Corporation,

Plaintiff, Counterclaim
Defendant, and Appellant,
v.

Case No. 20111085

CAMBRIA HOME OWNERS
ASSOCIATION, INC., a Utah non-profit
Corporation,

Defendant, Counterclaimant,
and Appellee.

APPEAL FROM ORDER OF CONFIRMATION OF ARBITRAL AWARD
THE HONORABLE JUDGE MCVEY
FOURTH JUDICIAL DISTRICT COURT
IN AND FOR UTAH COUNTY, STATE OF UTAH

BRIEF OF APPELLANT

COLE CANNON
CANNON LAW GROUP, PLLC
455 East 400 South, #400
Salt Lake City, Utah 84111
Attorney for Appellee
Cambria Homeowners Association,
Inc.

JUSTIN D. HEIDEMAN (USB #8897)
TRAVIS LARSEN (USB #11697)
HEIDEMAN, MCKAY, HEUGLY & OLSEN, L.L.C.
2696 North University Avenue, Suite 180
Provo, Utah 84604
Telephone: (801) 812-1000
jheideman@hmho-law.com
tlarsen@hmho-law.com
Attorneys for Appellant
American Home Systems, LLC, dba Why'rd

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HEIDEMAN, MCKAY, HEUGLY & OLSEN, L.L.C.
2696 North University Avenue, Suite 180
Provo, Utah 84604
Telephone: (801) 812-1000
jheideman@hmho-law.com
tlarsen@hmho-law.com
Attorneys for Appellant
American Home Systems, LLC, dba Why'rd

LIST OF PARTIES TO THE PROCEEDING

All of the parties to this proceeding are identified in the caption on the cover page.

TABLE OF CONTENTS

LIST OF PARTIES TO THE PROCEEDING	ii
TABLE OF CONTENTS.....	iii
TABLE OF AUTHORITIES	v
STATEMENT OF JURISDICTION.....	1
STATEMENT OF ISSUES PRESENTED FOR REVIEW	1
CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES	4
STATEMENT OF THE CASE.....	4
Nature of the Case, Course of Proceedings, and Disposition Below.....	4
Statement of the Facts.....	5
SUMMARY OF THE ARGUMENT	12
ARGUMENT.....	15
I. WHY'RD FULFILLED THE AGREEMENT WHERE (a) THE AGREEMENT PROVIDES THAT MINIMUM LEVELS OF THROUGHPUT ARE NOT GUARANTEED, (b) WHY'RD WAS ONLY OBLIGATED TO "MAINTAIN FUNCTIONAL SERVICE FOR NO LESS THAN 20% OF A 120 CONSECUTIVE DAY PERIOD," AND (c) WHY'RD MAINTAINED THE CABLE AND INTERNET "SYSTEM."	15
a. The Agreement specifically provides that minimum levels of throughput are not guaranteed; therefore, Why'rd did not breach the Agreement.	16
b. Why'rd Maintained Functional Internet Service for No Less than 20% of 120 Consecutive Days.	20
c. The Arbitrator misinterpreted Why'rd's obligations under the Agreement to monitor, control, and keep in good working order, the "System."	22
II. CAMBRIA BREACHED THE AGREEMENT WHEN ITS RESIDENTS ENGAGED IN "HIGH VOLUME" AND "COMMERICAL" INTERNET USE, THUS EXCUSING WHY'RD'S FURTHER PERFORMANCE OF THE AGREEMENT.	24

III. CAMBRIA INTERFERRED WITH WHY'RD'S PERFORMANCE OF ITS OBLIGATIONS AS THEY RELATE TO PROVIDING QUALITY INTERNET SERVICE.	29
IV. WHY'RD PERFORMED ITS OBLIGATION TO PROVIDE CABLE TELEVISION TO CAMBRIA; ANY BREACH BY WHY'RD OF ITS OBLIGATION TO PROVIDE CABLE TELEVISION TO CAMBRIA WAS IMMATERIAL.	33
a. Why'rd fulfilled its obligations under the Agreement to provide cable television.....	33
b. Any breach by Why'rd was not material.	36
V. CAMBRIA HAS BEEN UNJUSTLY ENRICHED.....	38
a. Why'rd should be compensated for the value of the infrastructure.....	40
b. Even if the Court determines that Why'rd breached the Agreement, and Cambria did not, Why'rd is still able to recover for unjust enrichment.....	42
VI. THE ARBITRATOR ERRED IN FINDING THAT WHY'RD DID NOT PROVIDE "SYSTEM CAPACITY OF 10 MBPS THROUGHPUT", WHERE CAMBRIA SPECIFICALLY ACKNOWLEDGED RECEIVING THIS LEVEL OF THROUGHPUT.	43
CONCLUSION.....	45

ADDENDUM

Exhibit 1 – Findings of Fact, Conclusion of Law and Order Denying Preliminary Injunction
Exhibit 2 – Arbitral Award
Exhibit 3 – 2005 Bulk Programming Services Agreement
Exhibit 4 – 2007 Bulk Programming Services Agreement

TABLE OF AUTHORITIES

Cases

<i>Bailey-Allen Co., v. Kurzet</i> , 876 P.2d 421 (Utah App. 1994).....	42
<i>Café Rio, Inc. v. Larkin-Gifford-Overton, LLC</i> , 2009 UT 27, 207 P.3d 1235	1, 3, 15
<i>Coalville City v. Lundgren</i> , 930 P.2d 1206 (Utah App. 1997)	3, 36
<i>Cook Assocs., Inc. v. Utah School and Institutional Trust Lands Admin.</i> , 2010 UT App 284, 243 P.3d 888	31
<i>Desert Miriah, Inc. v. B&L Auto, Inc.</i> , 2000 UT 83, 12 P.3d 580	2
<i>Educators Mut. Ins. Ass'n v. Evans</i> , 2011 UT App 171, 258 P.3d 598	15
<i>Equine Assisted Growth and Learning Ass'n v. Carolina Cas. Ins. Co.</i> , 2011 UT 49, 266 P.3d 733	15
<i>Gilmor v. Family Link, LLC</i> , 2010 UT App 2, 224 P.3d 741	1, 2, 3
<i>Glenn v. Reese</i> , 2009 UT 80, 225 P.3d 185	15
<i>Glew v. Ohio Sav. Bank</i> , 2007 UT 56, 181 P.3d 791	1, 2, 3
<i>Green River Canal Co. v. Thayn</i> , 2003 UT 50, 84 P.3d 1134	15
<i>Haymore v. Levinson</i> , 328 P.2d 307 (Utah 1958).....	31
<i>Jackson v. Rich</i> , 28 Utah 2d 134, 499 P.2d 279 (1972).....	24
<i>Jeffs v. Stubbs</i> , 970 P.2d 1234 (Utah 1998)	38
<i>Larry J. Coet Chevrolet, Pontiac Buick, Inc. v. Labrum</i> , 2008 UT App 69, 180 P.3d 765	15
<i>Lowe v. Rosenlof</i> , 364 P.2d 418 (Utah 1961).....	42
<i>Markham v. Bradley</i> , 2007 UT App 379, 173 P.3d 865	2
<i>McKeon v. Williams</i> , 104 Or.App. 106, 799 P.2d 198 (1990).....	3
<i>Oman v. Davis Sch. Dist.</i> , 2008 UT 70, 194 P.3d 956.....	31
<i>PDQ Lube Ctr., Inc. v. Huber</i> , 949 P.2d 792 (Utah App. 1997)	30
<i>Polyglycoat Corp. v. Holcomb</i> , 591 P.2d 449 (Utah 1979)	36

<i>Rapp v. Mountain States Tel. & Tel. Co.</i> , 606 P.2d 1189 (Utah 1980).....	39, 40
<i>Rawlings v. Rawlings</i> , 2010 UT 52, 240 P.3d 754	38
<i>Reliance Ins. Co. v. Utah Dept. of Transp.</i> , 858 P.2d 1363 (Utah 1993)	35, 36
<i>Richardson v. Hart</i> , 2009 UT App 387, 223 P.3d 484	1, 3
<i>Selvig v. Blockbuster Enters., LC</i> , 2011 UT 39, 266 P.3d 691	38
<i>SME Indus., Inc. v. Thompson, Ventulett, stainback and Assocs., Inc.</i> , 2011 UT 54, 28 P.3d 669	19
<i>Stephens v. Doxey</i> , 198 P. 261 (Utah 1921).....	42
<i>Ted R. Brown and Associates v. Carnes Corp.</i> , 753 P.2d 964 (Utah App. 1988)	35
<i>Truong v. Holmes</i> , 2009 UT App 212	38
<i>Valcare v. Bietters</i> , 362 P.2d 427 (Utah 1961).....	19
<i>WebBank v. Am. Gen. Annuity Serv. Corp.</i> , 2002 UT 88, 54 P.3d 1139	15
<i>Whitaker v. Utah State Ret. Bd.</i> , 2008 UT App. 282, 191 P.3d 814.....	2
<i>Wilson v. Johnson</i> , 2010 UT App. 137, 234 P.3d 1156.....	24
<i>Zion's Properties, Inc. v. Holt</i> , 538 P.2d 1319 (Utah 1975)	36, 37
Other Authorities	
<i>Black's Law Dictionary</i> 1281 (5th ed. 1979)	35
<i>Restatement (Second) of Contracts</i> §374 (1981)	42

STATEMENT OF JURISDICTION

Jurisdiction is proper in this Court under Utah Code Ann. § 78A-4-103(2)(j).

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the Arbitrator erred in finding Why'rd breached the Agreement where (a) the Agreement provides that "minimum levels of throughput are not guaranteed," (b) Why'rd was only obligated to "maintain functional service for no less than 20% of a 120 consecutive day period", and (c) Why'rd maintained the cable and internet "System".
 - a. Standard of Review: Correctness.
 - b. Determinative Law: *Richardson v. Hart*, 2009 UT App 387, ¶ 6, 223 P.3d 484; *Café Rio, Inc. v. Larkin-Gifford-Overton, LLC*, 2009 UT 27, ¶ 21, 207 P.3d 1235.
 - c. Preservation: R. 1288:15-1287:2; R. 885:22-884:9; R. 777:3-9.
2. Whether the Arbitrator erred in failing to find that Cambria residents had engaged in "high volume" or "commercial" internet use.
 - a. Standard of Review: Clearly Erroneous.
 - b. Determinative Law: *Glew v. Ohio Sav. Bank*, 2007 UT 56, ¶ 18, 181 P.3d 791; *Gilmor v. Family Link, LLC*, 2010 UT App 2, ¶10, 224 P.3d 741.
 - c. Preservation: R. 972:5-17; R. 966:13-965:6.
3. Whether the Arbitrator erred in failing to conclude that Cambria had interfered with Why'rd's performance of the Agreement, or had breached the covenant of good faith and fair dealing, by preventing Why'rd from disconnecting "heavy

users” or by refusing “quality of service” regulation, or by refusing to pay for additional bandwidth.

- a. Standard of Review: Correctness.
 - b. Determinative Law: *Markham v. Bradley*, 2007 UT App 379, ¶ 12, 173 P.3d 865.
 - c. Preservation: R. 965:7-963:24; R. 1688-1687.
4. Whether the Arbitrator erred in finding that Why’rd did not provide “system capacity of 10 mbps throughput,” where Cambria acknowledged receiving this level of throughput.
- a. Standard of Review: Clearly Erroneous.
 - b. Determinative Law: *Glew*, 2007 UT 56, ¶ 18; *Gilmor*, 2010 UT App 2, ¶10.
 - c. Preservation: R. 961:25-960:10.
5. Whether the Arbitrator erred in concluding that Cambria is not unjustly enriched by retaining possession of Why’rd’s infrastructure.
- a. Standard of Review: Correctness.
 - b. Determinative Law: *Desert Miriah, Inc. v. B&L Auto, Inc.*, 2000 UT 83, ¶ 9, 12 P.3d 580 (unjust enrichment is a mixed question of law and fact); *Whitaker v. Utah State Ret. Bd.*, 2008 UT App. 282, ¶ 11, 191 P.3d 814 (stating that when reviewing mixed questions of law and fact, the Court reviews the underlying facts for clear error and the application of the law for correctness). Why’rd does not seek to appeal underlying facts found by

the arbitrator on this issue, only the legal conclusion as to the unjust enrichment claim; therefore, the Court should review for correctness.

c. Preservation: R. 893:12-892:13.

6. Whether the Arbitrator erred in failing to find that Cambria breached the Agreement and that such breach excused Why'rd's obligation to perform under the Agreement.

a. Standard of Review: Clearly Erroneous as to finding of breach.

Correctness as to the excusal of Why'rd's performance obligation.

b. Determinative Law: *Glew*, 2007 UT 56, ¶ 18, ; *Gilmor, LLC*, 2010 UT App 2, ¶10; *Richardson*, 2009 UT App 387, ¶ 6; *Café Rio, Inc.*, 2009 UT 27, ¶ 21.

c. Preservation: R. 1539:8-15; R. 1515:20-1514:3; R. 1691-1686.

7. Whether the Arbitrator erred in finding Why'rd breached the Agreement by providing "poor television service" where Why'rd fulfilled its obligations under the Agreement to provide cable television service, or where any performance failure by Why'rd was an immaterial breach of the Agreement.

a. Standard of Review: Correctness.

b. Determinative Law: *Coalville City v. Lundgren*, 930 P.2d 1206, 1209 (Utah App. 1997) (citing *McKeon v. Williams*, 104 Or.App. 106, 799 P.2d 198, 200 (1990)) ("Generally, whether a breach is material is a question of fact to be decided by the jury, unless the facts are undisputed; then it is a question of law for the court.")

c. Preservation: R. 1462:6-1460:6; R. 914:11-19; R. 1697-1695.

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

None.

STATEMENT OF THE CASE

Nature of the Case, Course of Proceedings, and Disposition Below

This is a contract action. The parties entered into a Bulk Programming Services Agreement (“Agreement”), and each party claims breach of this Agreement by the other. American Home Systems, LLC dba Why’rd (“Why’rd”) filed suit in the Fourth District Court on July 10, 2009, along with a motion for preliminary injunction seeking to enjoin Cambria Homeowner’s Association, Inc. (“Cambria”) from terminating the Agreement and contracting with different service providers to replace Why’rd. Judge McVey held an evidentiary hearing on Why’rd’s motion for preliminary injunction on July 30, 2010. Judge McVey concluded there was a substantial likelihood Why’rd would prevail on the merits of its claims, but, because the Court could not find irreparable harm, the motion for preliminary injunction was denied. [R. 531-525; attached as Addendum Exhibit 1]. The matter was then submitted for arbitration, pursuant to the Agreement.

On May 5 & 6, 2011, the matter came before the Arbitrator Craig Metcalf (the “Arbitrator”), and the parties presented evidence. The parties submitted their closing arguments by written brief thereafter. [Why’rd’s Closing Argument was lodged with the Trial Court; R. 1704-1660]. The Arbitrator entered an Arbitral Award in favor of Cambria [R. 591-578, attached as Addendum Exhibit 2] and concluded that Why’rd breached the Agreement in the following six ways:

- a. Failure to supply a system capacity within the project of 10 mbps to each tenant.
- b. Failure to provide each tenant with access to 3 mbps of download throughput upon completion of the project.
- c. Failure to adequately monitor and control the system in order to preserve the integrity of the system for all of its users.
- d. Failure to take necessary steps to maintain the system in good working order and repair.
- e. Poor television service.
- f. Failure to re-evaluate broadband, internet, and data services every two years to ensure that services being offered by Why'rd are comparable in price and quality to services being offered to the majority of the general public. Whether or not Why'rd actually re-evaluated every two years, the price and quality of the services offered by Why'rd were not comparable to those offered to the general public and this constituted a material breach.

The Arbitral Award was confirmed by Judge McVey, upon Why'rd's motion, on November 17, 2011. [R. 593-592].

Statement of the Facts

Construction of the Cambria Project and Formation of the Agreement

In 2005 Trophy Homes was building a large-scale condominium development at Cambria. [See R. 905:24]. As a selling point or "buzz word", Trophy Homes desired to provide internet services. [R. 904:3-6; R. 607:9-17]. Trophy negotiated with Why'rd to provide cable and internet services for the Cambria development. [R. 979:11-14; R. 978:13-17]. Why'rd initially offered internet service that would cost \$29.95 per month per tenant; Trophy rejected that proposal, because it was uncertain as to the level of internet Cambria residents would want. [R. 903:2-18]. Trophy informed Why'rd that it only wanted basic internet service and if residents wanted to, they could later buy upgrades and higher levels

of bandwidth. [R. 901:17-21; see also R. 895:14-23]. Trophy was not concerned about providing internet, other than to just make sure the backbone was in place. [R. 895:11-13]. Trophy informed Cambria that its budget for cable and internet was \$42 per month and that it wanted a 45 channel cable package. [R. 901:12-17]. Why'rd made it clear to Trophy that all it could provide to Cambria at the stated price point was a single T1 line in Cambria Phase I and an additional T1 line to Phase II. [R. 888: 7-11]. Each T1 line provides 1.5 mbps of data throughput. [R. 961:21-23]. Why'rd discussed this information with Trophy, and Trophy was aware, that it was paying \$6 per month for internet. [R. 781:13-16].

Trophy and Why'rd ultimately agreed upon and signed a contract, the 2005 Bulk Programming Services Agreement for cable and internet services. [R. 20-9; R. 909:16-19, attached hereto as Addendum Exhibit 3]. Why'rd specifically negotiated two provisions in the 2005 contract that addressed the fact Trophy had purchased only minimal internet service: (1) a provision stating the Why'rd did not guarantee minimum levels of throughput [R. 885:22-884:9], and (2) a provision stating that "The system is not designed for the support of high volume or commercial grade servers" [R. 882:8-20]. Why'rd negotiated these provisions because it was concerned Cambria residents would not long be satisfied with the basic level of internet that was being purchased. [R. 885:22-102:9; R. 882:8-20].

Why'rd's deal to provide internet and cable to Cambria was a long-term investment. [R. 909:7-9]. It cost Why'rd \$834,000 to build the cable and internet infrastructure for Cambria. [R. 1394:24-1393:1]. When Why'rd built the infrastructure, it had to bring in internet wiring from a distance of half a mile to a mile away. [R. 1078:6-10]. Why'rd built the cost of constructing the Cambria infrastructure into the terms of its original contract with

Trophy, intending to recover the cost over the course of the contract. [R. 893:5-7; see also R. 1078:11-16]. Pursuant to the 2005 contract, Why'rd began providing a basic internet service designed for basic internet functions, such as web browsing and email. [R. 881:2-9].

In 2007 Cambria decided it wanted more cable channel options from Why'rd. [R. 915:15-16]. Jason Sucher ("Sucher") of Advanced Management, Cambria's property management company, negotiated the increased cable offering with Why'rd on behalf of Cambria at Cambria's request. [R. 627:24-626:5]. Sucher only negotiated the terms of the contract as they related to the cable offerings; there was no discussion about internet because the internet terms had already been established. [R. 625:10-18]. As a result of these negotiations with Sucher, Why'rd agreed to provide an additional 15 channels to Cambria in exchange for an extension of the 2005 contract. [R. 915:18-21; see R. 914:11-19]. This extension is memorialized as the Bulk Programming Services Agreement ("Agreement"). [R. 88-77; R. 909:20-21, attached as Addendum Exhibit 4]. The parties agreed that the term of the Agreement would be "7 years from the day that a certificate of occupancy is issued to the last building in the project." [Agreement, p. 1]. The only differences between the original 2005 contract and the Agreement are as follows:

- a. A monthly price increase of \$0.20 per tenant,
- b. An increase of 15 cable channels, and
- c. The extension of the length of the deal.

All other terms remained the same. [See Agreement and 2005 contract]. Construction for Cambria was not complete until 2009; thus, the Agreement should have run through 2016. [R. 823:25-822:4; R. 1033:24-25]. All of the negotiation regarding the internet took place

in forming the 2005 contract. [R. 620:16-21]. Sucher did not negotiate any terms related to the internet that were different from those set forth in the 2005 contract. [R. 732:10-16; R. 620:11-21].

Cambria Internet Use

During the initial years of the contract, when there were not many Cambria tenants, the limited bandwidth was sufficient for demand. [R. 880:3-9]. As of December 2006, Why'rd was providing seven T1 lines, or 10.5 mbps throughput, to the head-end unit at Cambria. [R. 961:16-960:10]. Ten-and-a-half mbps throughput exceeded what Why'rd was obligated to provide under the Agreement. [R. 846:5-11]. At the time the third phase of Cambria was built, Cambria East, Why'rd upgraded the system which ultimately had the capacity to serve 50 mbps throughput. [R. 885:4-11]. Over time, the Cambria units became populated with a large number of residents who desired faster internet speeds. [R. 880:10-18]. Cambria was, however, not willing to pay for increased bandwidth, and at no point did Cambria purchase more bandwidth than that which was originally negotiated for in the 2005 contract. [R. 836:14-17].

In violation of the terms of the Agreement, Cambria residents abused the internet system. [R. 879:22-25]. Cambria residents hosted web sites. [R. 976:22]. Why'rd observed at least half a dozen Cambria residents working from home as web site developers. [R. 975:12-14]. Cambria residents engaged in a commercial range of throughput. [R. 973:11-12]. Cambria residents hosted at least two commercial web sites, one of which was a commercial pornographic website. [R. 972:9-14]. Cambria's own expert witness,

Spencer Wangsgard, acknowledged that hosting a pornographic site is a commercial use. [R. 1539:8-12].

Ted Burnett testified that utilization of the internet at Cambria was at least 70 or 80 percent higher than other similar developments he had monitored and that he had never seen a larger assembly of more internet hungry people ever. [R. 970:5-12]. Further, Ted Burnett stated that there was more bandwidth utilized in that particular project than in the other half dozen projects he was monitoring at the time. [R. 970:13-16]. Why'rd observed one tenant download over 1 gigabyte per hour for twelve hours. [R. 968:15-18]. Why'rd observed that another Cambria resident left for the weekend and downloaded all nine seasons of Stargate. [R. 964:15-18]. Cambria resident, Montane Hamilton, was using his internet as a programmer to monitor certain websites he was running. [R. 1509:3-10].

Cambria residents who engaged in high volume use created a major problem by utilizing an excessive amount of available bandwidth, thus preventing other Cambria residents from satisfactory access to the internet. [See R. 973:3-6]. Cambria residents complained about the internet speeds. [R. 1610:13-15]. The heavy demand on the internet system at Cambria led to slow internet speeds and poor internet performance. [R. 934:13-15].

Why'rd's Proposed Solutions

In response to the poor internet performance, Why'rd offered several solutions to Cambria, but each offer was declined, as follows:

1. Why'rd offered to double Cambria's bandwidth for \$2 per month; Cambria did not accept. [R. 890:13-17; see also R. 758:2-5]. Cambria informed Why'rd that it would not, under any circumstances, raise HOA fees. [R. 758:18-21].

2. Why'rd proposed to disable heavy internet users' internet access, but was told by Cambria that it could not turn off internet access to these persons. [R. 963:8-17; 870:15-20].

3. Why'rd offered to set up a computer where a member of Cambria could monitor internet use of Cambria residents, in particular heavy internet users, allowing Cambria to determine the appropriate action to take against heavy users. [R. 934:25-933:9; R. 1104:15-19].

4. Why'rd proposed a Quality of Service, or QOS, regulation. [R. 930:20-22; R. 1508:8-17]. A QOS manages internet information to optimize bandwidth utilization. [R. 697:2-4]. A QOS works by prioritizing certain internet functions. [R. 948:1-21; R. 941:25-940:19]. QOS drastically minimizes the impact of "bandwidth hogs." [R. 1083:10-25]. A QOS would have had a massive impact on the bandwidth utilization at Cambria. [R. 940:20-25]. Cambria did not accept Why'rd's QOS proposal because Cambria felt that Why'rd was obligated to pay for the QOS. [R. 1592:19-25]. There is no requirement in the Agreement for Why'rd to provide QOS or bandwidth throttling tools. [R. 1560:16-21].

The tension between the parties about the Cambria internet system was aptly described by Michael Burnett, a principal of Why'rd, at arbitration thusly [R. 891:15-890:21]:

Well, when we originally quoted, based on that document, the original quote for 29.95 [sic] a month for Internet was, I guess if we were to create an analogy, I would say we quoted them a -- a Toyota Land Cruiser to get them back and forth to work every week. They said, Well, we can't afford that. We don't want it. And we said, that will get you there all the time, rain or snow, 365 days a year. And then they came back and said, Well, we just can't afford it, so what else can we do? We don't want to spend that. We don't know whether the HOA members or future HOA members will want to pay that because we don't know their demographics, so what else will get us to work? And we said, well, there's a Chevy Geo, and you can buy a Chevy Geo, but it's going to have a limited -- it's going to have its limitations. So as soon as the snow started to fall and they got stuck in the snow, they came to us and said, We're not going to make payments on this Chevy Geo because it isn't getting us to work in the snow. And I said, Yeah, but the Land Cruiser will if you want the Land Cruiser. And back when those conversations took place, you know, we were saying we can double the bandwidth for \$2 a month. They said, No, we're not charging everybody more money a month on their HOA fee. We've got too many people that aren't even able to make the HOA fee as it is with this recession going on, so raising the HOA fee is out of the question. I says, okay, then make your payment on the Geo.

Termination of the Agreement

In 2010, Cambria stopped making payments pursuant to the Agreement. [R. 1515:21-1514:3; see also R. 1346: 8-14]. The Agreement was terminated 77 months early. [R. 821:24-820:2]. Pursuant to the Agreement, Why'rd continues to own the Cambria cable and internet infrastructure until the end of the term of the Agreement. [R. 894:12-20]. To remove the infrastructure from Cambria would require the destruction of street and sidewalks, tearing up asphalt and cement, and relaying asphalt and cement. [R. 1077:12-17]. The cost for Why'rd to repossess the infrastructure would exceed \$100,000. [R. 1077:18-23]. The present value of the infrastructure is \$608,000. [See R. 1341:14-1338:15].

SUMMARY OF THE ARGUMENT

Why'rd spent \$834, 570.88 constructing a cable and internet infrastructure for the Cambria development. In exchange, Cambria promised to pay Why'rd to provide cable and internet to its residents until 2016. Cambria terminated the parties' Agreement 77 months prematurely, depriving Why'rd of the revenue it desperately needed to recover its investment into the Cambria project. The Arbitrator excused Cambria's termination of the Agreement, finding that Why'rd had breached the Agreement. The Arbitrator was, however, in error on certain crucial points. For the reasons set forth below, Why'rd petitions this Court to correct those errors and find that Cambria, not Why'rd, is in breach of the Agreement.

First, the Court should carefully note that the Agreement specifically states that "[g]uarantee of minimum throughput levels are not available due to the constant fluctuation of utilization throughout the system." Despite this clear and unambiguous disclaimer, the Arbitrator erroneously found that Why'rd was obligated to provide at least 2.7 mbps throughput to Cambria residents. There is no evidence to support this conclusion. To the exact contrary of guaranteeing a certain level of throughput, the parties specifically, and in writing, acknowledged that no guarantee would be available. This is an obvious misinterpretation of the Agreement, which the Court should correct.

The Arbitrator further found that Why'rd breached the Agreement by failing to monitor, control, and keep its system in good working order, and that Why'rd failed to make its services comparable to services of other providers in the marketplace. These breaches were also identified in error. The Arbitrator failed to recognize that the term

“System” is a defined term in the Agreement and that Why’rd performed its obligations with respect to the “System.” The term “System” in the Agreement is essentially defined as the equipment involved in providing cable and internet services – it has nothing to do with maintaining a certain level of internet bandwidth. There was no evidence that Why’rd failed to maintain the “System.”

To address Cambria’s complaints about internet bandwidth, Why’rd proposed several solutions. Cambria refused these solutions and interfered with Why’rd’s attempts to remedy the bandwidth congestion. Why’rd proposed to disable internet access to those who used the internet in violation of the Agreement, but was told by Cambria that it could not shut off anyone’s internet. Why’rd offered to double Cambria’s bandwidth for \$2 per month per tenant, but Cambria refused to pay any additional money. Why’rd proposed an installation of a QOS regulation, but Cambria did not want to pay for a QOS. Why’rd demanded more and more bandwidth, but was unwilling to pay for more, and prevented Why’rd from taking measures to manage bandwidth access.

The Arbitrator failed to find that Cambria violated the Agreement when its residents engaged in “high volume” and “commercial” use of the internet, which use was prohibited by the Agreement. Cambria residents were internet hungry and used the internet at a rate 70 to 80 percent higher than average. Cambria residents hosted commercial websites and worked from home as web site developers. Certain Cambria residents were bandwidth hogs and nearly monopolized available bandwidth in the community. Cambria’s unauthorized use of the internet prevented Why’rd from providing

controlled internet, in good working order, comparable in price to that being provided by other internet service providers.

The Arbitrator found that Why'rd breached the Agreement by providing "poor television service." The Arbitrator also found that Why'rd fulfilled its customer service obligation to fix poor television service. These two conclusions are mutually exclusive. Where Why'rd provided adequate customer service, it cannot have breached the Agreement by providing "poor television service." Even if the Court were to accept the notion that Why'rd somehow failed to provide adequate television service, this would not have constituted a material breach of the Agreement, especially when weighing the heft of the cost incurred by Why'rd to build the Cambria infrastructure against television quality inconveniences that were ultimately serviced by Why'rd.

Finally, the Court should hold that Cambria has been unjustly enriched by retaining the infrastructure Why'rd built. It is impractical for Why'rd to remove the infrastructure from Cambria. The cost of the infrastructure was built into the Agreement and has only been partially repaid. Even if Cambria is not responsible for the remaining 77 payments under the Agreement, it should at least be responsible for 77 months worth of the prorated infrastructure value - \$400,064. Even if Why'rd is held in breach of the Agreement, it is still able to recover unjust enrichment damages for the benefit it conferred upon Cambria which exceeded the damages it caused Cambria by its breach.

ARGUMENT

I. WHY'RD FULFILLED THE AGREEMENT WHERE (a) THE AGREEMENT PROVIDES THAT MINIMUM LEVELS OF THROUGHPUT ARE NOT GUARANTEED, (b) WHY'RD WAS ONLY OBLIGATED TO "MAINTAIN FUNCTIONAL SERVICE FOR NO LESS THAN 20% OF A 120 CONSECUTIVE DAY PERIOD," AND (c) WHY'RD MAINTAINED THE CABLE AND INTERNET "SYSTEM."

"The primary purpose of contract interpretation is to 'ascertain the intentions of the parties' at the time of contracting." *Equine Assisted Growth and Learning Ass'n v. Carolina Cas. Ins. Co.*, 2011 UT 49, ¶ 13, 266 P.3d 733 (citing *WebBank v. Am. Gen. Annuity Serv. Corp.*, 2002 UT 88, ¶ 17, 54 P.3d 1139). "To discover these intentions, we first examine the plain language of the contract." *Id.* (citing *Glenn v. Reese*, 2009 UT 80, ¶ 10, 225 P.3d 185; *Green River Canal Co. v. Thayn*, 2003 UT 50, ¶ 17, 84 P.3d 1134).

"Under well-accepted rules of contract interpretation, we look to the language of the contract to determine its meaning and the intent of the contracting parties." *Café Rio, Inc. v. Larkin–Gifford–Overton, LLC*, 2009 UT 27, ¶ 25, 207 P.3d 1235. "If the language within the four corners of the contract is unambiguous, the parties' intentions are determined from the plain meaning of the contractual language, and the contract may be interpreted as a matter of law." *Larry J. Coet Chevrolet, Pontiac Buick, Inc. v. Labrum*, 2008 UT App 69, ¶ 18, 180 P.3d 765 (internal quotation marks omitted); see also *Educators Mut. Ins. Ass'n v. Evans*, 2011 UT App 171, 258 P.3d 598.

- a. **The Agreement specifically provides that minimum levels of throughput are not guaranteed; therefore, Why'rd did not breach the Agreement.**

Schedule 2 of the Agreement specifically provides that “[g]uarantee of minimum throughput levels are not available due to the constant fluctuation of utilization throughout the system.” This language is not ambiguous. It quite simply means that Why'rd disclaims any particular level of throughput – there is no other plausible meaning of this provision.

The Arbitrator construed, as a conclusion of law, that the Agreement provision “Guarantee of minimum throughput levels are not available due to constant fluctuation of the utilization of the system” means that throughput levels near 3 mbps were required and that reductions of throughput of roughly 10% could be expected at infrequent intervals. [Arbitral Award, Conclusions, ¶ 1]. This interpretation of the Agreement openly contradicts the plain language of the Agreement. The plain language of the Agreement is clear that, because of fluctuating use of the system, Why'rd does not guarantee minimum throughput level.

In order to reach the conclusion that the Agreement obligates Why'rd to provide throughput levels of 2.7 mbps, the Arbitrator would have had to consider evidence extrinsic to the Agreement, which, as a matter of law, would first require a finding that the Agreement is ambiguous. The Arbitrator did not find that the Agreement was ambiguous. Inasmuch as the Schedule 2 provision is not ambiguous, the Arbitrator erred in allowing extrinsic evidence about this provision.

Why'd carefully reviewed the arbitration testimony to find anything that would support the notion that a 10% reduction in throughput could be expected at infrequent intervals, or that 2.7 mbps is the minimum level of throughput required. There are only two exchanges that even approach this notion – and they're both long shots, requiring a substantial level of assumption and speculation. The first came from a question by Cambria's attorney to Jason Sucher, Cambria's property manager. Their exchange was as follows:

Q. All right. You've read the language in the contract that says that there's no guarantee of speed. Seems like a pretty typical type statement. But if the association were getting 90 percent of what they were promised, do you think you would have had the type of complaints you were receiving?

MR. HEIDEMAN: Objection. Calls for speculation.

THE COURT: He can answer as to his opinion and knowledge.

THE WITNESS: I don't think so.

BY MR. CANNON: Q. How about 80 percent?

MR. HEIDEMAN: Same objection.

THE COURT: Go ahead.

THE WITNESS: I don't know what a percentage people would be satisfied. I can't go beyond that.

BY MR. CANNON: Q. Let me ask you this: If the tenants were getting 10 percent or less of the speed that they were promised in that contract, does that fall within the no guarantee language?

MR. HEIDEMAN: Objection. Leading and calls for speculation.

THE COURT: Go ahead and answer.

THE WITNESS: Could you ask it again.

BY MR. CANNON: Q. I guess what I'm trying to understand is you see a clause that says we don't guarantee our speed, right?

A. Right.

Q. That's pretty common of Internet service providers. But at what point, in your judgment as an HOA manager of 100 HOAs out there, does the level of service drop so far below what that is promised that the no guarantee language just flies out the door?

A. I'm going to say honestly that I don't know what percentage that is.

Q. Okay.

A. -- I don't know if that answered your question, but I --

Q. Yeah, that's fine.

A. -- can't assign a percentage to it.

The notion that Why'rd was required to provide at least 90% of 3 mbps to Cambria tenants came from Cambria's attorney and not from any witness. Mr. Sucher says that he does not know what level of throughput would have been acceptable. Additionally, the question called by Sucher to speculate, and a due objection was made as to this point by Why'rd counsel. This exchange should not have led the Arbitrator to the conclusion that Why'rd had assured Cambria of at least 2.7 mbps throughput.

The only other reference to a 10% decrease in throughput access was found in an exchange between Cambria's attorney and Cambria's expert witness, Spencer

Wangsgard:

Q. Okay. My question is, you know, you've indicated that to actually have a dedicated amount, guaranteed 3 megs, guaranteed 20 megs, that's difficult to do. It's very costly to do.

A. Yes.

Q. So there's some wiggle room. Is that the reason why ISPs include these no guarantee kind of clauses?

A. Yes, because like I said, it's not financially feasible to bring in that amount of bandwidth for each individual user. And so you scale back the amount of bandwidth you have. But, you know, if you're not hitting probably 90 percent of the time your stated speed, the customer is going to drop you. They're unhappy with the service.

The testimony from Mr. Wangsgard supports the fact that Why'rd could not, and did not, provide a guarantee to Cambria, and includes Mr. Wangsgard's opinion that if an internet service provider was providing less than 90 percent of its stated speed, it would have dissatisfied customers. Mr. Wangsgard offers no testimony that the minimum level of throughput required by the Agreement is 2.7 mbps. It was error for the Arbitrator to rely on this testimony in concluding that Why'rd was required to provide at least 2.7 mbps throughput.

A warranty, or guarantee, requires a direct and positive affirmation of fact made guaranteeing a result. *See SME Indus., Inc. v. Thompson, Ventulett, stainback and Assocs., Inc.*, 2011 UT 54, ¶ 21, 28 P.3d 669. "A condition precedent to the enforcement of any contract is that there be a meeting of the minds of the parties, which must be spelled out, either expressly or impliedly, with sufficient definiteness to be enforced." *Valcare v. Bietters*, 362 P.2d 427, 428 (Utah 1961). Why'rd did not make any direct and positive affirmation of fact guaranteeing a specific amount of throughput to Cambria. In fact, Why'rd did just the opposite and expressly disclaimed any guarantee of a specific level of throughput. Why'rd was concerned in 2005 about the adequacy of the level of internet being purchased for Cambria, and Why'rd specifically negotiated the "no

guarantee” provision because of this concern. As it turns out, Why’rd’s concerns were well founded and, unfortunately, it now finds itself in the exact position it bargained to avoid – having customers who became dissatisfied with their bare-bones, basic internet bandwidth. Because Why’rd anticipated that basic internet service might be dissatisfactory to Cambria at some point, it specifically disclaimed any guarantee of the throughput available to Cambria residents.

In light of its clear disclaimer, it is impossible to say that the parties had a meeting of the minds that Why’rd would guarantee Cambria 2.7 mbps throughput. The Arbitrator erred in finding that Why’rd assured Cambria of 2.7 mbps throughput. Because Why’rd did not guarantee any level of throughput, it was also error for the Arbitrator to conclude that Why’rd breached the Agreement by “Failure to provide each tenant with access to 3 mbps of download throughput upon completion of the project.”

b. Why’rd Maintained Functional Internet Service for No Less than 20% of 120 Consecutive Days.

Under the subheading “Service Level Agreement,” Schedule 2 of the Agreement provides that, upon completion of the Cambria development, Why’rd was required to “maintain functional service for no less than 20% of a 120 consecutive day period.” This is an unambiguous provision to the Agreement. Similar to the “no guarantee” provision, the “Service Level Agreement” provision of the Agreement was specifically negotiated to address potential future concerns about the level of internet Why’rd would be providing to Cambria. In order to comply with the service level required under the terms of the

Agreement, the internet service needed to be functional for only 24 days of a four-month period upon completion of Cambria. Why'rd complied with this standard.

Construction on Cambria was not completed until 2009. [R. 1288:20-1287:4].

Under the terms of the Agreement, Why'rd was not contractually obligated to meet any minimum service level requirements until construction on Cambria was completed in 2009, and even then, only 24 days out of four consecutive months. Cambria has not provided any evidence that the Internet service provided by Why'rd functioned for less than the required 24 days of a 120 consecutive day period. Without such evidence, Cambria has not met its burden of proof and thus Why'rd cannot be found in breach of the Agreement.

In light of the "Service Level Agreement" provision, it was error for the Arbitrator to conclude that Why'rd's service could only fall below 3 mbps at infrequent intervals. The Agreement specifically provides that Why'rd only needed to maintain service 20% of the time. The Arbitrator did not make any finding as to the fulfillment of this requirement and given the lack of evidence, this Court should reverse the Arbitral Award. However, if necessary, this Court should do no less than remand this matter to the Trial Court to find if Why'rd's service fell below "functional service" for "20% of a 120 consecutive day period." Because Why'rd's service level did not fall below this threshold, Why'rd should not be held in breach of the Agreement.

c. The Arbitrator misinterpreted Why'rd's obligations under the Agreement to monitor, control, and keep in good working order, the "System."

The Arbitrator concluded that Why'rd failed to monitor, control, and keep in good working order, the system. These breaches are specifically stated in the Arbitral Award, paragraphs 3 (c) and (d), to wit:

3. Why'rd has materially breached the Agreement in at least the following particulars: ...
 - c. Failure to adequately monitor and control the system in order to preserve the integrity of the system for all of its users.
 - d. Failure to take necessary steps to maintain the system in good working order and repair.

In support of these conclusions, the Arbitrator found that "the fact that Mr. Campbell could 'hog' the bandwidth is an indication that the system was not in good working order and repair and was not being adequately monitored." [Arbitral Award, Findings of Fact, ¶ 14].

As stated above, when interpreting the duties of parties to a contract, the Court begins by examining the plain language of the contract. Section 3.5 of the Agreement provides that Why'rd will "keep the System and all related equipment in good working order and repair" Schedule 2 of the Agreement provides that "The system is designed as a 'residential system' meaning that high level of volume that indicates server related activity will be monitored and controlled to preserve the integrity of the system for all of its users." The term "System" is specifically defined in Section 1 of the Agreement as "a coaxial, fiber optic or hybrid fiber optic, SMATV, MMDS, 5-900MHz or 18 GHz multi-channel

audio, video, data, internet, broadband services distribution system owned and managed by [Why'rd] which serves the Property.”

The Arbitrator misinterpreted the Agreement. It is evident from the Arbitral Award that the Arbitrator has construed Why'rd's obligations as they relate to the “System” to mean that Why'rd was obligated to keep internet bandwidth in good working order. This is not the obligation Why'rd accepted in the Agreement. The Agreement obligated Why'rd to keep those items enumerated in Section 1 of the Agreement, the distribution mechanisms, in good working order, not to keep in good working order the ability of individual tenants to access desired levels of bandwidth. As discussed above, Why'rd made absolutely no guarantee about an individual's access to the internet because of “constant fluctuation of utilization throughout the system.” [Agreement, Schedule 2]. Thus, Why'rd's obligation under Section 3.5 of the Agreement was to keep the infrastructure, i.e. the equipment, in good working order. Section 3.5 of the Agreement has nothing to do with Why'rd ensuring certain bandwidth levels to Cambria tenants.

The Arbitrator found that “Some of the problems in the system could have been alleviated by the installation of a Quality of Service (QOS) device. Such a device was never installed. No adequate bandwidth monitoring or throttling mechanism was installed.” [Arbitral Award, Findings of Fact, ¶ 19]. The Arbitrator seems to include a QOS into the definition of “System” from Section 1 of the Agreement. However, the Agreement does not obligate Why'rd to purchase a QOS for Cambria. Why'rd's obligation to purchase, install, repair and maintain anything for Cambria is limited to those items that constitute the “System,” and the “System” is clearly defined. The

“System”, as defined, does not include throttling tools or equipment to optimize bandwidth.

Cambria did not introduce evidence that Why’rd failed to maintain the “System” as that term is defined in the Agreement. Cambria, instead, focused on perceived failures of the bandwidth available to its residents, and was apparently successful in convincing the Arbitrator that Why’rd’s obligation to maintain the “System” included an obligation to provide a guaranteed level of bandwidth and a QOS. No such obligation is found in Sections 1 or 3.5 of the Agreement. As a matter of law, the Arbitrator’s interpretation of the Agreement is erroneous and should be corrected by this Court.

II. CAMBRIA BREACHED THE AGREEMENT WHEN ITS RESIDENTS ENGAGED IN “HIGH VOLUME” AND “COMMERICAL” INTERNET USE, THUS EXCUSING WHY’RD’S FURTHER PERFORMANCE OF THE AGREEMENT.

“A party first guilty of a ... material breach of contract cannot complain if the other party thereafter refuses to perform.” *Wilson v. Johnson*, 2010 UT App. 137, ¶ 18, 234 P.3d 1156, 1162 (quoting *Jackson v. Rich*, 28 Utah 2d 134, 499 P.2d 279, 280 (1972)). The Arbitrator failed to find Cambria in breach of the Agreement – this was error. Because Cambria breached the Agreement, Why’rd’s further performance of the Agreement ought to have been excused. Whether Cambria breached the Agreement turns on certain factual findings that should have been made by the Arbitrator, but were not. Therefore, Why’rd will have to demonstrate that the Arbitrator’s failure to find breach was clearly erroneous. *See Wilson*, 2010 UT App. 137. Schedule 2 of the Agreement provides as follows: “This system is not designed for the support of high volume or

commercial grade servers.” Why’rd challenges the Arbitrator’s failure to find that Cambria residents engaged in “high volume” and “commercial” use of the internet system in violation of Schedule 2 of the Agreement.

Cambria contracted for an internet system that was to be “designed as a ‘residential system,’ meaning that high level of volume that indicates server related activity will be monitored and controlled to preserve the integrity of the system for all of its users.” The Agreement specifically indicated that the system was not “designed for the support of high volume or commercial grade servers,” and Cambria agreed that the system would not be used for such purposes. While monitoring the system’s usage, however, Ted Burnett, the director of operations and lead service technician for Why’rd, regularly observed Internet usage that “seemed to be at least probably 70 or 80 percent higher than almost any other place” comparable to Cambria that he had monitored, and that he had never seen a larger assembly of more internet hungry people ever. [R. 970:5-12]. Ted stated that there was more bandwidth utilized in Cambria than in the other half dozen projects he was monitoring at the time. [R. 970:13-16].

Through his monitoring activities, Ted Burnett observed at least half a dozen Cambria residents working from home as web site developers. [R. 975:12-14]. Ted identified that these six tenants were using the bandwidth on a commercial level, as measured by the quantity of throughput. [R. 951:23-950:1]. Cambria residents hosted web sites. [R. 976:22]. Two tenants were using the Internet system to host commercial Web sites, including one commercial pornographic web site. [R. 972:9-14]. Another tenant was identified as using commercial level bandwidth to download all nine seasons

of Stargate. [R. 965:12-964:18]. This excessive use of bandwidth by only a handful of individuals was “beyond the scope” of the residential capacity of the system, [R. 975:11-17], and constituted an “abuse” of the residential service, [R. 968:15-22]. Cambria’s expert agreed that a tenant hosting a commercial pornographic website violates the Agreement. [R. 1539:8-12]. Cambria tenants admitted to Ted Burnett to engaging in web development using the Cambria internet. [R. 973:13-972:4]. At one point, in September of 2008, Ted Burnett observed one tenant, Shane Campbell, downloading more than 1 gigabyte per hour for approximately 12 hours, 51% of the overall bandwidth for that entire time. [R. 966:13-965:6]. Cambria resident, Montane Hamilton, was using his internet as a programmer to monitor certain websites he was running. [R. 1509:3-10].

The excessive demand put onto the system by this high volume and commercial use of the internet prevented the residents of Cambria from having satisfactory bandwidth access. The high volume and commercial use led to slow internet speeds and poor internet performance. Why’rd could not reasonably meet Cambria’s demands for better internet when the Cambria residents were blatantly violating the terms of the Agreement. Four of the breaches found by the Arbitrator should not have been found in light of Cambria’s high volume and commercial use of the internet, to wit:

- b. Failure to provide each tenant with access to 3 mbps of download throughput upon completion of the project.
- c. Failure to adequately monitor and control the system in order to preserve the integrity of the system for all of its users.
- d. Failure to take necessary steps to maintain the system in good working order and repair.

- f. Failure to re-evaluate broadband, internet, and data services every two years to ensure that services being offered by Why'rd are comparable in price and quality to services being offered to the majority of the general public. Whether or not Why'rd actually re-evaluated every two years, the price and quality of the services offered by Why'rd were not comparable to those offered to the general public and this constituted a material breach.

[Arbitral Award, Conclusions, ¶¶ 3 (b), (c), (d), and (f)]. Cambria residents prevented Why'rd from providing controlled internet, in good working order, comparable in price to that being provided by other internet service providers. Why'rd could not provide each tenant access to 3 mbps of throughput where other Cambria residents were hijacking the available bandwidth.

It was clear error to not find that Cambria residents engaged in “high volume” and “commercial” use of the internet provided by Why'rd, where they plainly did so. Because Cambria residents violated these provisions of the Agreement, Why'rd should have been excused from its obligations under the Agreement. This Court should find that Cambria breached the Agreement and reverse the decision of the Arbitrator.

Marshalling

The facts set forth above are largely uncontradicted by Cambria. Nevertheless, Why'rd, in fulfillment of its obligation to marshal evidence against its own argument, provides the following as all facts upon which the Arbitrator might have relied in finding that Cambria residents did not engage in “high volume” and “commercial” use of the internet system:

- “Other tenants found the internet service to be unusable for normal residential internet use. Tenants testified that the internet was frequently out and that basic functions such as email and blogging were not functional.” [Arbitral Award, Findings of Fact, ¶ 11].

- Ted Burnett considered activities such as watching YouTube videos, attaching photos to emails, blogging, and streaming Netflix to be residential uses of the internet [R. 951:10-20], even though he considered streaming Netflix videos and blogging to be high volume use [R. 937: 15-20].
- Robert Schmoyer, expert witness for Why'rd, did not consider sending e-mails with attachments or watching YouTube to be commercial uses of the internet [R. 640:1-11], even though he considered accessing YouTube to be high volume use [R. 637:9-16].
- Robert Schmoyer did not generally consider streaming video to be a commercial use of the internet, depending on the purpose for streaming the video [R. 640:12-16], even though he considered streaming video to be a high volume use [R. 637:17-19].
- Robert Schmoyer did not consider the use of Skype to be a commercial use of the internet in most cases [R. 640:17-22], even though he considered using Skype to be a high volume use [R. 637:20-636:9].
- Robert Schmoyer expected that e-mail, video streaming, and Skype would be uses available to residents in 2011. [R. 640:23-639:2].
- Brent Skipper testified that he often had problems connecting to the internet, bringing up Web pages, and checking his e-mail, and that more often than not, he could not access the internet. Mr. Skipper also testified that the internet was very, very slow and that he would sometimes go to a friend's house to use the internet. [R. 1268:20-1267:8].
- Mr. Skipper testified that he wanted to use the internet for "football, ESPN, e-mail ... [and] gaming." [R. 1251:3-6].
- Spencer Wansgard, an expert witness for Cambria, testified that streaming video became something that a lot of people did from 2008 to 2010. [R. 1158:9-16].
- Mr. Wansgard testified that heavy and commercial use are not synonymous and that the term "heavy Internet users" was not the same as commercial users. [R. 1547:22-1546:7].
- Montane Hamilton testified that Internet reliability was a "constant struggle." [R. 1513:6-11].
- Mr. Hamilton testified that from 2007 to 2008, he experienced regular interruptions in the internet service that sometimes lasted several days. [R. 1510:19-15093].
- Ted Burnett could not recall the names of the Cambria tenants engaged in web development, and he could not point to any specific documentation to show that Cambria tenants had engaged in web development. [R. 956:1-16].
- Ted Burnett was not absolutely positive about the name of the commercial pornographic website being hosted from a Cambria tenant, but he thought the name was "Triple X Matches" or "something like that." [R. 956:22-24].
- Ted Burnett could not name any of the other URLs that were being hosted at Cambria. [R. 955:10-16].

Despite any facts that the Arbitrator might have relied on, it was clear error to fail to find that Cambria residents had used the internet system in a manner that was specifically prohibited by the Agreement. Why'rd could not identify any specific facts which the Arbitrator might have relied on for the conclusion that Cambria residents did not engage in high volume use. The Court should rule that Cambria breached the Agreement by engaging in high volume use of the internet.

The limited facts that Why'rd has been able to marshal as to the commercial use of the internet are really all examples of residential use of the internet. Cambria residents likely all engaged in residential use of the internet, so it is no surprise that there was testimony about residential internet uses. However, the Agreement specifically forbids commercial use of the internet, and while much of the internet use at Cambria was not commercial, some of it was. This commercial use of the internet is a breach of the Agreement. Cambria offered no evidence to contradict the evidence of Why'rd that Cambria residents hosted commercial websites. The Court should rule that Cambria breached the Agreement when its residents engaged in commercial use of the internet.

III. CAMBRIA INTERFERED WITH WHY'RD'S PERFORMANCE OF ITS OBLIGATIONS AS THEY RELATE TO PROVIDING QUALITY INTERNET SERVICE.

Three of the six breaches found by the Arbitrator are relevant to this section of Why'rd's argument:

- c. Failure to adequately monitor and control the system in order to preserve the integrity of the system for all of its users.
- d. Failure to take necessary steps to maintain the system in good working order and repair.

- f. Failure to re-evaluate broadband, internet, and data services every two years to ensure that services being offered by Why'rd are comparable in price and quality to services being offered to the majority of the general public. Whether or not Why'rd actually re-evaluated every two years, the price and quality of the services offered by Why'rd were not comparable to those offered to the general public and this constituted a material breach.

The Arbitrator found Why'rd in breach of the Agreement for failure to monitor, control, and keep in good working order, the system, and for failure to offer service comparable in quality to other services on the market. Cambria prevented Why'rd's efforts to carry out its obligations. Had Cambria allowed Why'rd to disconnect abusers of the internet system, or had Cambria not refused a QOS, Why'rd would have been able to effectively control the system and keep it in good working order. Similarly, if Cambria had accepted Why'rd offer and agreed to pay \$2 more per month per tenant, Why'rd could have doubled Cambria's bandwidth, which would have vastly improved the internet quality.

Cambria does not dispute that it instructed Why'rd that it could not shut off heavy internet users, it does not dispute that it rejected Why'rd proposal to double the bandwidth for \$2 per tenant per month, and it does not dispute that it refused the QOS because it felt that Why'rd was obligated to purchase the QOS. Thus, the Court must determine whether Cambria interfered with Why'rd's performance of the Agreement or breached the covenant of good faith and fair dealing (1) by disallowing Why'rd to shut off internet access to bandwidth hogs, (2) by refusing to purchase more bandwidth, or (3) by refusing the QOS. If Cambria did in fact interfere with Why'rd's performance of the Agreement, the Court should excuse Why'rd's performance of the Agreement.

“One party may not render it difficult or impossible for the other to continue performance and then take advantage of the non-performance he has caused.” *PDQ Lube Ctr., Inc. v. Huber*, 949 P.2d 792, 795 (Utah App. 1997). “An implied covenant of good faith and fair dealing inheres in every contract. Under the covenant of good faith and fair dealing, both parties to a contract impliedly promise not to intentionally do anything to injure the other party's right to receive the benefits of the contract.” *Cook Assocs., Inc. v. Utah School and Institutional Trust Lands Admin.*, 2010 UT App 284, ¶ 16, 243 P.3d 888, 894 (quoting *Oman v. Davis Sch. Dist.*, 2008 UT 70, ¶ 47, 194 P.3d 956).

In *Haymore v. Levinson*, the Supreme Court dealt with a case in which a contractor built a house. 328 P.2d 307 (Utah 1958). When the contractor had finished his work the buyers indicated they were not satisfied and requested that the contractor perform some additional items of work, which the contractor agreed to do. *Id.* at 308-09. When the contractor came to the house to perform the additional work, the buyers demanded even more additional work, and the contractor refused. *Id.* at 309. The buyer refused to allow the contractor to finish his work unless he would complete all the additional work they were requesting. *Id.* The Court held that the contractor satisfactorily performed the work and that any work the contractor failed to perform was a result of the buyers’ interference. *Id.* at 310.

The *Haymore* analysis is directly applicable to the present case. Here, Why’rd provided the services it agreed to provide. When Cambria requested that Why’rd do something about the limited bandwidth availability, Why’rd proposed solutions to Cambria. Why’rd offered to install a QOS to regulate bandwidth usage, Why’rd offered

to double bandwidth, and Why'rd proposed shutting off "bandwidth hogs" who engaged in internet use impermissible under the Agreement. Cambria responded that Why'rd could not shut off any tenant's internet access, it would not pay for more bandwidth, and that Cambria was unwilling to pay for a QOS.

Had a QOS been in place at Cambria, the breaches described above would not have occurred. "Some of the problems in the system could have been alleviated by the installation of a Quality of Service (QOS) device." [Arbitral Award, Findings of Fact, ¶ 19]. QOS drastically minimizes the impact of bandwidth hogs. [R. 1083:10-25]. A QOS would have had a massive impact on the bandwidth utilization at Cambria. [R. 940:20-25].

Because Cambria refused solutions to the internet problems, Why'rd, under the circumstances, satisfactorily performed its obligations under the Agreement. Any failure by Why'rd to perform its obligations was a direct result of Cambria not allowing Why'rd to shut off bandwidth hogs and its refusal to purchase a QOS.

The Arbitrator found that "Why'rd failed to keep the system competitive within industry standards." [Arbitral Award, Findings of Fact, ¶ 24]. Based on this, the Arbitrator concluded that "the price and quality of the services offered by Why'rd were not comparable to those offered to the general public and this constituted a material breach." [Arbitral Award, Conclusions, ¶ 3(f)]. Where Cambria prevented Why'rd's efforts to ensure the quality of the service it was providing, this Court should rule that Why'rd's performance of the Agreement is excused.

IV. WHY'RD PERFORMED ITS OBLIGATION TO PROVIDE CABLE TELEVISION TO CAMBRIA; ANY BREACH BY WHY'RD OF ITS OBLIGATION TO PROVIDE CABLE TELEVISION TO CAMBRIA WAS IMMATERIAL.

The Arbitrator concluded that Why'rd breached the Agreement by providing "poor television service." This conclusion was supported by the following factual findings:

Television service provided by Why'rd was frequently poor and included blank channels, fuzzy channels, missing channels, changing channel numbers and the like. Tenants had no ability to upgrade television service. For example, there was no evidence that any tenant was able to upgrade to HD. Certain tenants supplemented their television service by other means, such as installation of a satellite dish. Cambria tenants logged numerous complaints about poor television service. [Arbitral Award, Findings of Fact, ¶¶ 16-17].

Why'rd challenges the Arbitral Award on the bases that (a) Why'rd fulfilled its obligations under the Agreement to provide cable television, and (c) any breach by Why'rd was immaterial.

a. Why'rd fulfilled its obligations under the Agreement to provide cable television.

Section 3.1 of the Agreement requires Why'rd to provide Cambria with cable television. Schedule 1 of the Agreement sets forth the channels Why'rd was to provide to Cambria. Section 3.6 of the Agreement, entitled "Customer Service", provides, in relevant part, as follows:

[Whyrd] will (i) maintain an incoming service telephone line that accepts trouble reports and billing and other inquiries from Subscriber and Tenants, 24 hours a day, 365 (or 366) days a year; (ii) respond to each Subscriber or Tenants trouble call, inquiry, and installation or service request within a 24 hour period

The Arbitrator concluded that “The customer service provided was marginal and problematic, but the Arbitrator does not specifically find that the low level of customer service constituted a material breach.” [Arbitral Award, Conclusions, ¶ 6].

It is uncontroverted that, pursuant to Section 3.1 and Schedule 1, Why’rd provided cable television to Cambria; therefore, Cambria met those requirements of the Agreement. If the cable television quality fell below a certain standard, the Agreement contains provisions for Cambria to address problems with Why’rd. Specifically, if Cambria was experiencing “poor television service” it should have availed itself of the mechanisms set forth in Section 3.6 of the Agreement. Why’rd fulfilled its obligations under Section 3.6. [See Arbitral Award, Conclusions, ¶ 6]. Where the Arbitrator found that Why’rd did not breach its obligations to provide customer service, the Arbitral Award should not conclude that “poor television service” constitutes a breach.

Section 3.6 of the Agreement contemplates that Why’rd’s service may require maintenance, and in order to correct “poor television service”, Cambria could notify Why’rd of its particular problems. Following such notification, Why’rd was obligated to respond within 24 hours. The Arbitrator acknowledged that Why’rd met its obligation to fix poor service. The Arbitral Award is, therefore, incorrect. Why’rd cannot have simultaneously fulfilled its obligation to fix poor service and also have breached the Agreement by providing poor service. If Why’rd adequately addressed Cambria’s poor television service, there is no breach.

Section 1 of the Agreement defines the services Why’rd was to provide to Cambria, the “Bulk Programming”, as “any video, audio, data, internet, or broadband

programming service delivered to the Property.” Section 3.1 of the Agreement provides, in relevant part, as follows:

Subscriber acknowledges that the owners/distributors of Bulk Programming, rather than [Why’rd], determine the content of the Bulk Programming, and as a result [Why’rd] shall have no responsibility of liability for Bulk Programming content. As between [Why’rd] and subscriber, or [Why’rd] and any Tenant, [Why’rd] has the sole right to edit, select, schedule and determine the [Why’rd] Programming services contained in the [Why’rd] programming packages [Why’rd] may add, delete, or modify the Bulk Programming, which may be caused, among other things, by satellite programming industry changes, deletions, additions, or the termination, modification or replacement of [Why’rd] programming agreements.

All that the Agreement requires is that Why’rd provide cable television – whether of poor quality or not, Why’rd provided to Cambria the channels set forth in Schedule 1 of the Agreement. Why’rd did what it was contracted to do. Furthermore, blank, missing, and changing channels do not constitute a breach by Why’rd. In Section 3.1 of the Agreement, Why’rd disclaimed responsibility for blank, missing, and changing channels. Blank, missing, and changing channels were the responsibility of the Bulk Programming distributor – in this case Echostar. The uncontroverted testimony of Why’rd’s expert, David Springer is that it is normal for a cable distributor to rotate the number channel on which it broadcasts its programming. [R. 1520:23-1519:8].

“[A] court may not make a better contract for the parties than they have made for themselves....” *Ted R. Brown and Associates v. Carnes Corp.*, 753 P.2d 964, 970-71 (Utah App. 1988). The Arbitral Award sanctions a better reading of the Agreement than that to which Cambria is entitled. Cambria got the channels it bargained for. Additionally, and more importantly, Why’rd met its obligation to address poor cable

quality. The Court should correct the Arbitrator's finding of breach as related to the cable television service.

Substantial performance exists "where there has been no willful departure from the terms of the contract, and no omission in essential points, and the contract has been honestly and faithfully performed in its material and substantial particulars." *Reliance Ins. Co. v. Utah Dept. of Transp.*, 858 P.2d 1363, 1370 (Utah 1993) (citing *Black's Law Dictionary* 1281 (5th ed. 1979)). A party has substantially performed when "the only variance from the strict and literal performance consists of technical or unimportant omissions or defects." *Id.*

The findings of the Arbitrator, at most, really just amount to unimportant variances from the Agreement. Blank, fuzzy, missing, and changing channels do not constitute willful departure from the Agreement, and do not change that Why'rd did in fact provide cable television. At bare minimum, the Court should acknowledge that, even if there was some defect in performance, Why'rd substantially performed its obligations.

b. Any breach by Why'rd was not material.

"Whether a breach is material is a question of fact to be decided by the jury, unless the facts are undisputed." *Coalville City*, 930 P.2d at 1209 (internal quotations omitted). A breach is material if it "defeats the very object of the contract" or "is of such prime importance that the contract would not have been made if default in that particular had been contemplated." *Id.* at 1210 (internal quotations omitted) (citing *Polyglycoat Corp. v. Holcomb*, 591 P.2d 449, 451 (Utah 1979)). "It is not every minor failure, which could otherwise be remedied, which will justify non-performance. It must be something so

substantial that it could be reasonably deemed to vindicate the other's refusal to perform.”
Zion's Properties, Inc. v. Holt, 538 P.2d 1319, 1321 (Utah 1975).

In *Zion's Properties*, the Holts sold property to Great Southern, who later assigned its purchase interest to Zion's Properties, Inc. *Id.* at 1320-21. Zion's Properties fell behind on its payments. *Id.* at 1321. Zion's Properties argued that the Holts breached the contract, justifying its non-performance of the contract, by storing their personal materials at the property. *Id.* The Supreme Court affirmed the trial court ruling that Zion's Properties could not show that the storage of personal items at the property “was of sufficient substance and materiality to justify its non-performance.” *Id.* at 1322. “Unless there is some showing of legal excuse or justification for failure to perform the obligations of a contract, it must be enforced according to its terms.” *Id.*

Similar to the findings in *Zion's Properties*, Why'rd having provided “poor television service” would not be of “sufficient substance and materiality” to justify Cambria's premature termination of the Agreement. This is especially true in light of the fact that the Agreement constituted a gigantic economic undertaking by the parties. The Arbitrator should not have concluded that problems with television channels, which may have been inconvenient, and which were often caused by user error or forces outside Why'rd control [see R. 1093:24-1090:15], resulted in a material breach of the Agreement. Blank, fuzzy, missing, and changing channels simply do not defeat the purpose of the Agreement. Weighing the inconvenience of imperfect cable television against the \$834,000 that Why'rd spent to build the Cambria infrastructure, especially

when Why'rd fulfilled its customer service obligations, should lead the Court to conclude that any breach by Why'rd was immaterial.

The Agreement represented an enormous monetary investment by Why'rd - \$834,570.88. In order to recover its investment, Why'rd had to have a long-term contract with Cambria, a contract for which it specifically bargained. The Court should further note that the Agreement had built-in customer service procedures, which were not breached. Therefore, even if Why'rd failed in some particulars to provide quality service, these breaches do not justify early termination of the Agreement.

V. CAMBRIA HAS BEEN UNJUSTLY ENRICHED.

If the Court determines that Cambria is not in breach of the Agreement, Why'rd is at least entitled to an award under the doctrine of unjust enrichment. Under Utah law, a claim for unjust enrichment consists of three elements: ““(1) a benefit conferred on one person by another; (2) an appreciation or knowledge by the conferee of the benefit; and (3) the acceptance or retention by the conferee of the benefit under such circumstances as to make it inequitable for the conferee to retain the benefit without payment of its value.”” *Rawlings v. Rawlings*, 2010 UT 52, ¶ 29, 240 P.3d 754 (quoting *Jeffs v. Stubbs*, 970 P.2d 1234 (Utah 1998) (internal citations omitted)). It is well-accepted law that “[u]njust enrichment is not available where the subject matter of the claim is covered by an express contract.” *Truong v. Holmes*, 2009 UT App 212, 2. However, “unjust enrichment plays an important role as a tool of equity” when other principles of law cannot remedy an injustice and, therefore, must be treated as a ““flexible and workable doctrine.”” *Rawlings*, 2010 UT 52, ¶ 29 (quoting *Jeffs*, 970 P.2d at 1245).

It is normally true that where an express contract covers the subject matter of the litigation, a party cannot recover for unjust enrichment. *See Selvig v. Blockbuster Enters., LC*, 2011 UT 39, ¶ 30, 266 P.3d 691, 698. Although an express contract exists between Why'rd and Cambria, disposition of the infrastructure in the event of early termination of the Agreement is not adequately addressed in the Agreement. Section 5.2 of the Agreement acknowledges that the infrastructure is the exclusive property of Why'rd during the life of the contract. Under Section 5.2, Why'rd is precluded from making a claim of exclusive ownership of the infrastructure after completion of the initial term of the Agreement. However, the parties did not make any provisions for how Why'rd would recover either the physical infrastructure or the value of the infrastructure if there was an early termination of the Agreement. Therefore, although an express contract exists between Why'rd and Cambria, premature disposition of the infrastructure is not covered by the Agreement and unjust enrichment is a proper remedy because no other remedy in law is available to Why'rd. Further, the Court should note that the Agreement only addresses Why'rd's provision of cable and internet services to Cambria – the Agreement does not relate to the building of the infrastructure at Cambria. Therefore, an unjust enrichment remedy is available to Why'rd as it relates to the infrastructure it built for Cambria's benefit.

Why'rd can easily establish the first two elements of unjust enrichment: Why'rd built Cambria's cable and internet infrastructure, the receipt of which is plainly manifest by Cambria's use thereof. All that is left, therefore, is for the Court to determine if it is unjust for Cambria to have received the infrastructure without compensating Why'rd in

return. The analysis that follows addresses the reasons why Cambria should have to compensate Why'rd for the value of the infrastructure.

a. Why'rd should be compensated for the value of the infrastructure.

The Supreme Court of Utah dealt with a case in which the plaintiff claimed the defendant had been unjustly enriched by the plaintiff's work in erecting a partition. *Rapp v. Mountain States Tel. & Tel. Co.*, 606 P.2d 1189 (Utah 1980). The plaintiff in *Rapp* had been hired to construct a telephone building. *Id.* at 1190. Certain flaws in the designs prepared by the defendant caused substantial delay to the project. *Id.* at 1191. During the delay, the defendant ordered the plaintiff to construct a temporary partition to protect telephone equipment. *Id.* The Court required the defendant to pay the value of the work performed by the plaintiff and held that "where work is ordered for the benefit of a building owner ..., such work must, in equity, be recompensed to avoid unjust enrichment." *Id.* at 1193. As in *Rapp*, Why'rd performed substantial work to benefit Cambria for which it has not been fully recompensed. It is inequitable for Cambria to have received the benefit of Why'rd's work without adequate recompense.

When Why'rd constructed the infrastructure, it had to bring in cabling from half a mile to a mile away. The total construction cost of the system was \$834,570.88. The system involved laying underground cables, building servers, and expanding and remodeling the server room after it was built incorrectly by the developer. The infrastructure is worth \$608,000, but the cost to Why'rd of removing it is not justifiable. Thus, the only real value to the infrastructure belongs to Cambria.

Cambria will claim that it will not be unjustly enriched by retaining the infrastructure built by Why'rd because Cambria is not utilizing the infrastructure with their new television and Internet provider. Arguing that Cambria has not been unjustly enriched because it is not now using the infrastructure totally ignores (1) that Why'rd built a system which Cambria did use and benefit from for some time, for which use and benefit Cambria has not fully compensated Why'rd, (2) that Why'rd has not been adequately compensated for the cost of the infrastructure, which cost Why'rd anticipated recovering over the period of a long-term contract, and (3) that the infrastructure still has value, even if Cambria chooses not to use it – like a car, indefinitely parked in a garage.

The Court must weigh Why'rd's substantial loss against any breach claimed by Cambria. Absent a remedy, Why'rd stands to lose the value of the infrastructure it built for Cambria, under the expectation that it would be able to recover its investment over a long-term contract. The value of the infrastructure is \$608,000. Cambria on the other hand, felt inconvenienced by limited bandwidth and less-than-perfect cable television. The inconveniences experienced by Cambria residents pale in comparison to Why'rd's weighty losses. It would be patently unfair to allow Why'rd to sustain these losses without requiring any compensation from Cambria, who terminated the Agreement before Why'rd could recover its investment.

Why'rd urges the Court to reverse the decision of the Arbitrator, and to hold that Cambria has been unjustly enriched in the amount of the value of the infrastructure, or that the Court remand this matter to the Trial Court with instructions to determine the amount in which Cambria has been unjustly enriched. The Agreement was effective as of

February 2007. The term of the Agreement did not begin to run until construction of the last building was complete. Cambria East was completed in October 2009; therefore, the seven-year term of the Agreement began in November 2009. Cambria ceased making payments to Why'rd in May 2010, resulting in 77 remaining payments under the Agreement. Why'rd concedes that it was paid for 40 of the 117 months of the expected course of the Agreement. Why'rd was not paid for 77 of 117 months, or 65.8 percent, of the term of the Agreement. Therefore, Why'rd also concedes that its expected recovery on an unjust enrichment claim is limited to 65.8 percent of the \$608,000 total value of the infrastructure, or \$400,064.

There is no practical way for Why'rd to retrieve the infrastructure. To retrieve the infrastructure, Why'rd would have to tear up sidewalks, streets, curbs, and gutters – the cost would be “a lot more” than a hundred thousand dollars. However, if the Court is not inclined to require Cambria to pay for the value of the infrastructure, it should at least require Cambria to remove the infrastructure at its own cost and deliver it to Why'rd.

b. Even if the Court determines that Why'rd breached the Agreement, and Cambria did not, Why'rd is still able to recover for unjust enrichment.

A party that is not in breach of a contract may still “have a quasi-contractual duty to pay the value of the benefit conferred in excess of the damage caused by the other party’s breach.” *Bailey-Allen Co., v. Kurzet*, 876 P.2d 421, 425 (Utah App. 1994). A “breaching party is liable for the loss caused by the breach, but may recover the benefit conferred if it exceeds that loss.” *Id.* at 426 (citing *Restatement (Second) of Contracts* §374 (1981)). In *Lowe v. Rosenlof*, a contractor was found to have abandoned a concrete job he was

supposed to complete. 364 P.2d 418 (Utah 1961). Despite his abandonment of the job, the contractor was entitled to quantum meruit damages for the portion of the work he had completed. *Id.* at 421. “[T]he law contemplates a substantial, but not punctilious, compliance” with contractual obligations. *Stephens v. Doxey*, 198 P. 261, 266 (Utah 1921).

Applying the rule from these cases, Why’rd can recover for the value of the infrastructure, and the amount by which Cambria has been unjustly enriched would be reduced by the amount of contract damages Why’rd owes to Cambria. Why’rd asserts that Cambria has been unjustly enriched by the value of the work and materials conferred by Why’rd in building Cambria’s cable and television infrastructure, less partial payment by Cambria, in the amount of \$400,064. The Arbitrator awarded Cambria damages in the amount of \$240. Therefore, even if the Court finds Why’rd in breach of contract, it can still recover unjust enrichment damages in the amount of \$399,824.

VI. THE ARBITRATOR ERRED IN FINDING THAT WHY’RD DID NOT PROVIDE “SYSTEM CAPACITY OF 10 MBPS THROUGHPUT”, WHERE CAMBRIA SPECIFICALLY ACKNOWLEDGED RECEIVING THIS LEVEL OF THROUGHPUT.

The Arbitrator found that Why’rd breached the Agreement by failing “to supply a system capacity within the project of 10 mbps to each tenant.” During the Arbitration, however, Cambria’s attorney acknowledged that the parties stipulated “that ten megabits was coming into the headend unit.” [R. 961:25-960:10]. Cambria’s attorney further stated as follows:

- “This whole issue has been exhausted when we had the hearing on December 7. In fact, it was stipulated to that 10 megs in fact was being received by the headend unit.” [R. 868:19-22].
- “I did not disagree that 10 megs was coming to the headend unit.” [R. 664:11-12].
- “Counsel, if you're trying to establish the 10 megs to the headend unit, it has been stipulated. Go on.” [R. 1046:9-11].

This finding of breach plainly contradicts the stipulation of the parties and was clearly erroneous. Certainly, the headend unit could not receive 10 mbps unless it had the capacity to do so. Cambria specifically acknowledged, at least four times, that Why’rd supplied 10 mbps to Cambria.

Because of the stipulation in place between the parties, neither party presented any substantial evidence on this point at the Arbitration. Why’rd is unaware of any evidence to support this finding. The basis for the finding of breach on this point is, therefore, difficult to determine. Whether the Court analyzes this under a clearly erroneous standard (for the Arbitrator’s erroneous factual finding), or a correctness standard (for the Arbitrator’s misinterpretation of the stipulation), it should reverse the finding of breach as to this issue.

In light of Why’rd’s uncertainty as to the basis of the Arbitrator’s finding of breach, in the very unlikely event that Cambria argues that the Arbitrator was not in error on this point, Why’rd begs some license to more fully address this breach in its reply brief.

CONCLUSION

For the reasons set forth above, Why'rd respectfully requests the Court to reverse the Arbitral Award and remand this matter for entry of judgment in favor of Appellant.

DATED and SIGNED this 12th day of March, 2012.

HEIDEMAN, MCKAY, HEUGLY & OLSEN, L.L.C.



JUSTIN D. HEIDEMAN
TRAVIS LARSEN

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION

I hereby certify, pursuant to Utah Rules of Appellate Procedure 24(f)(1)(C), that the Appellant's principal brief complies with the type-volume limitation set forth in Utah Rules of Appellate Procedure 24(f)(1)(A). Appellant's brief contains 12,047 words.

DATED and SIGNED this 12th day of March, 2012.

HEIDEMAN, MCKAY, HEUGLY & OLSEN, L.L.C.

A handwritten signature in black ink, appearing to read 'Travis Larsen', written over a horizontal line.

TRAVIS LARSEN

CERTIFICATE OF SERVICE

I hereby certify, that on the 13th day of March, 2011, I caused to be served upon the below-named party two true and correct copies of the Brief of Appellant, via US mail, postage prepaid.

Cole Cannon
CANNON LAW GROUP, PLLC
455 East 400 South, #400
Salt Lake City, Utah 84111
Attorney for Appellee
Cambria Homeowners Association, Inc.

HEIDEMAN, MCKAY, HEUGLY & OLSEN, L.L.C.

A handwritten signature in black ink, appearing to read 'Travis Larsen', written over a horizontal line.

TRAVIS LARSEN

ADDENDUM

EXHIBIT 1

AUG 03 2010

4TH DISTRICT
STATE OF UTAH
UTAH COUNTY

IN THE FOURTH JUDICIAL DISTRICT COURT
IN AND FOR UTAH COUNTY, STATE OF UTAH

AMERICAN HOME SYSTEMS LLC dba
WHY'RD,
Plaintiff,

vs.

CAMBRIA HOMEOWNERS
ASSOCIATION,
Defendant.

FINDINGS OF FACT, CONCLUSION OF
LAW AND ORDER DENYING
PRELIMINARY INJUNCTION

Civil No. 090402548
Judge SAMUEL D. MCVEY

The Court held an evidentiary hearing on July 30, 2010 regarding plaintiff's motion for a preliminary injunction. Justin Heideman, Esq. represented plaintiff and Cole Cannon, Esq. represented defendant. Plaintiff sought a pretrial order enjoining defendant from: 1) terminating and further breaching its bulk programming agreement with plaintiff; 2) ejecting and prohibiting plaintiff from accessing defendant's condominiums; and 3) allowing other service providers to service defendant's condominiums.

Findings of Fact

The Court enters the following findings of fact from the hearing, noting that neither side has had an opportunity to fully develop their case in chief yet and thus these facts are found without prejudice.

The parties entered a written "Bulk Programming Services Agreement" on February 15, 2005 in which defendant promised to pay plaintiff for cable television, broadband internet and fire alarm data transmission for seven years to condominiums owned by defendant's members. This original agreement was entered by the developer, Trophy Homes, acting as the Cambria Homeowners Association which the defendant homeowners association now consists of. When the condominium owners later took over the homeowners association, the parties modified the agreement on February 8, 2007 by extending it another four years.

Plaintiff installed a cable and data line infrastructure and provided various hardware and software facilities in defendant's development. It then provided the signals carrying the cable television and internet services to the condominiums. The fire alarm signals went through the

data lines installed by plaintiff. The agreement called for plaintiff to retain ownership over the cable facilities and data lines. It also called for plaintiff to be the sole provider of internet and cable television services, although it did allow residents to purchase additional services above and beyond those plaintiff was providing. Plaintiff would front financing for installation of the infrastructure called for in the contract and recoup its costs over the life of the contract.

The portion of the agreement relating to the fire alarm system appears to be subject to a separate, unintegrated contract. There was a written memorandum of the contract but it was never signed by both parties. However, the written bulk agreement appears to vest in plaintiff the ownership of the data lines carrying the fire alarm signals.

Defendant made payments of \$13,597.92 monthly until approximately June, 2009 when it quit paying for the fire alarm service. It continued the cable and Internet payments until May 2010 when it terminated its payments. It did so because of widespread complaints among its members since at least December 2008 and a series of other, but lesser, complaints before that which led to April and June, 2009, letters from defendant's counsel to plaintiff purporting to terminate the agreement. The complaints had to do with how slow the internet was and also some poor reception of television channels. They also complained plaintiff did not respond to service requests in a timely manner. It is unclear why defendant quit paying for the fire service other than its board thought it had no contract with plaintiff. It is clear there was a fire contract but it was never reduced to writing and could possibly be subject after a year to the Statute of Frauds.

Regarding the television and internet, it appears the original developer negotiated very basic services with plaintiff in order to reduce the cost to the lowest level possible and thus create a selling point for the development. It was not placing a priority on the ability of the residents to access sophisticated levels of internet use regard and had no intention of providing anything other than a rudimentary ability to browse the web and send simple text emails and homeowners had to share access with other residents. Further, plaintiff appeared to be the only entity in the area willing and able to provide such service since the "large providers" like Comcast were not doing business there. Notwithstanding the limited service specified in the contract, plaintiff actually provided more bandwidth than the contract called out. Plaintiff also invested in a high definition television upgrade for the development, although it apparently did not always work as expected. The upgrade was accompanied by the contract extension. The scope of the development also expanded after the original agreement when another unexpected phase of the development was added to the internet and cable access, further diluting the bandwidth. The contract was not upgraded by defendant to take this additional demand into account.

Plaintiff covenanted to review its services every two years to insure they were comparable in price and quality to those used by a majority of the population. As it appeared to provide for the bare services contracted for; plaintiff remained in compliance in that its cable television cost was slightly less expensive but the internet was slightly more so than the national average. The internet was performing as intended so long as people did use it beyond what was intended by "hogging" the development's capacity. There was, for example, an occasion when one homeowner was occupying nearly half the bandwidth to do work at home, a use that exceeded the simple personal use contemplated in the agreement.

Finally, defendant contracted with another provider for fire alarm services when it quit paying plaintiff. That contractor is using data lines identified in the bulk agreement as plaintiff's. In May, 2010, defendant contracted with a wireless internet and television provider and claims not to be using plaintiff's cable and servers any longer.

Conclusions of Law

The parties stipulated to granting plaintiff its second point of relief and thus defendant is enjoined from prohibiting plaintiff to enter the development and have access to and remove its property with the exception of the data lines outside the condominiums, which lines serve the fire system. The only people with any foundation in the matter testified, however, the data lines are those identified in the bulk agreement as belonging to plaintiff. The Court will address those lines below.

Rule 65A(e) if the Utah Rules of Civil Procedure sets forth the elements an applicant for preliminary injunction must satisfy in most cases:

- (1) The applicant will suffer irreparable harm unless the order or injunction issues;
- (2) The threatened injury to the applicant outweighs whatever damage the proposed order or injunction may cause the party restrained or enjoined;
- (3) The order or injunction, if issued, would not be adverse to the public interest; and
- (4) There is a substantial likelihood that the applicant will prevail on the merits of the underlying claim, or the case presents serious issues on the merits which should be the subject of further litigation.

Utah R. Civ. P. 65A(e), *Hunsaker v. Kersch*, 1999 UT 106, 991 P.2d 67, 69 (Utah 1999). The Court works through the latter three factors then looks at the issue of irreparable harm.

The threatened injury to the applicant if not granted preliminary relief in this matter is that it will be displaced from the financial benefits of its exclusive contract, including funds advanced for infrastructure for defendant's benefit. It will also lose its data lines until trial as they have been taken over by another fire alarm company. The loss would constitute a very large portion of plaintiff's business. Defendant would have to pay for a contract which it believes was breached by plaintiff's substandard service. Defendant would also have to rescind a contract with its new provider, although the Court will not consider this point in defendant's favor because it appears there was a settlement some time ago to extend a temporary restraining order providing defendant would not get a new provider. Plaintiff did not really put that matter in evidence, although it argued it. Defendant denies it was bound by the stipulation and while that issue and accompanying attorneys fees are a matter for future resolution, defendant knew there was purportedly such a stipulation when it contracted a new carrier and cannot now claim a hardship as a result of not getting a declaration of the stipulation's validity before getting a new provider. Since defendant could continue to receive plaintiff's services and pay for them without changing its position and while preserving the status quo ante, but plaintiff would suffer serious losses by not being able to pay for the infrastructure pursuant to the contract plan, this factor goes to plaintiff.

The preliminary injunction would not be adverse to public interests. Parties enjoin others from quitting relationships all the time. Defendant argues that since defendant has many members—about 303 homeowners—whereas plaintiff only has about six employees, issuing an injunction would somehow violate democratic principles. Defendant cites no authority for this novel theory and the Court cannot think of any. There is a public interest in having parties comply with contract terms regardless of the relative numbers of souls involved.

The Court believes based on the facts above, which could change at trial or arbitration, there is a substantial likelihood plaintiff will prevail on the merits of its contract claims, although the Court cannot predict whether plaintiff will obtain injunctive relief because of the potential adequacy of a certain, liquidated legal remedy. The parties contracted for a very low level of service and plaintiff provided the service. Although there were complaints and failures, the Court cannot conclude at this point they were material breaches. Rather, there appeared to be substantial performance on plaintiff's part. The scope of complaints and problems was certainly

not universal and was probably occasioned more by the contract's technical performance terms bargained for in exchange than by plaintiff's failure to meet those terms on occasion.

Defendant argued an FCC ruling prohibited plaintiff from being an exclusive provider. However, the Court is not convinced the FCC has jurisdiction over a small, intrastate service. Further, plaintiff seemed to have authority to the contrary indicating a exclusivity agreement was legal.

The issue of irreparable harm to plaintiff depends on case law which states irreparable harm is a concepts of several faces. On the one hand, it traditionally means there is no available legal remedy, thus invoking equity. On the other, it means there is no adequate legal remedy for various reasons. One thing is certain, "Injunctive relief is not purely limited to cases where no other possible remedy will be available. Its broader purpose is preventive in nature." *Id.* at ¶6, 991 P.2d at 69.

Our Supreme Court outlines the concept:

[T]he "irreparable harm" justifying a preliminary injunction includes "wrongs of a repeated and continuing character, or which occasion damages that are estimated only by conjecture, and not by any accurate standard." . . . "Irreparable injury" justifying an injunction is that which cannot be adequately compensated in damages or for which damages cannot be compensable in money." [*System Concepts, Inc. v. Dixon*, 669 P.2d 421, 427-28 (Utah 1983)] (emphasis added) (citing *Black's Law Dictionary* 707 (rev. 5th ed. 1979)). . . . Where *Dixon* refers to an injury "which cannot be adequately compensated in damages," it does not limit injunctive relief to those harms which could never be assigned a dollar value. Rather, it merely acknowledges that monetary compensation does not always make an injured party whole.

Id. The evidence presented demonstrates plaintiff can be made whole with money damages. The contract, payment receipt history and construction cost records of plaintiff provide a ready means of calculating damages, which could be substantial. Further, plaintiff could collect such damages from the property and interests of the association, which owns both real property and personal property. It also has members who could, potentially along with their individual condos, be assessed damages in supplemental proceedings. Defendant's prior counsel threatened bankruptcy in prior contacts with plaintiff, but such threat was merely puffing and plaintiff's representative, who is a finance major, indicates defendant is liquid.

However, loss of business and goodwill can be grounds for irreparable injury. *Dixon* at 428. But this is only the case where such loss “could be estimated only by conjecture and not by any accurate standard.” *Id.* Here we have an accurate standard as noted. Further, the lost business and goodwill would only be with respect to that originating from defendant and would not spread to plaintiff’s relations with third parties. Thus, there would be no need to speculate on the impact of a breach of contract on plaintiff’s other customers.

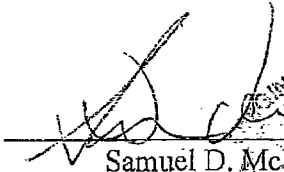
Finally, the Court could see potential irreparable harm if the breach of contract were to drive plaintiff out of business. Plaintiff’s financial chief testified, however, that while the loss of defendant’s payments would constitute a major setback, plaintiff would be able to remain in business. The element of irreparable harm is not established. With respect to the data system, however, it is plaintiff’s under the contract and plaintiff is entitled to a provisional remedy to recover it. Plaintiff requested an amendment for such a remedy at the hearing and there was no objection or showing of prejudice with respect to asking for the remedy. Given the data lines apply to a fire alarm signal, defendant has 60 days to surrender control of them to avoid temporary loss of alarm coverage.

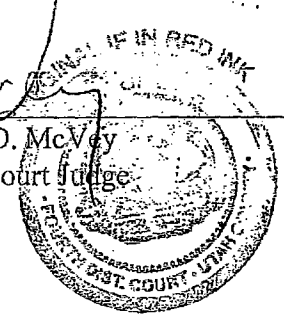
Order

WHEREFORE IT IS ORDERED:

For the foregoing reasons, the motion for preliminary injunction is denied with the exception of the stipulated agreement that plaintiff may enter the property to have access to and remove its personal property immediately and the Court’s ruling that after 60 days the data system and lines belonging to it may be accessed and controlled by defendant. The issue of attorneys fees is reserved.

Dated this 3rd day of August 2010


Samuel D. McVey
District Court Judge



CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 090402548 by the method and on the date specified.

MAIL: JUSTIN D HEIDEMAN 2696 N UNIVERSITY AVE STE 180 PROVO, UT 84604 + Fax 801-374-1724

MAIL: COLE CANNON 455 E. 400 S. # 400 SLC UT 84111 + Fax 801-363-3013

Date: 8/4/10

Call *Steph*

Deputy Court Clerk

EXHIBIT 2

**IN THE FOURTH JUDICIAL DISTRICT COURT
IN AND FOR THE STATE OF UTAH, UTAH COUNTY
ARBITRATION CONDUCTED BY CRAIG METCALF OF KIRTON & McCONKIE**

AMERCIAN HOME SYSTEMS, LLC. Dba
WHY'RD, a Utah Corporation,

Plaintiff,

v.

CAMBRIA HOMEOWNERS ASSOCIATION,
INC., a Utah non-profit Corporation,

Defendant.

CAMBRIA HOMEOWNERS ASSOCIATION,
INC., a Utah non-profit Corporation,

Counterclaim Why'rd

v.

AMERCIAN HOME SYSTEMS, LLC. Dba
WHY'RD, a Utah Corporation, MIKE BURNETT,
an individual, and JUSTIN BURNETT, an
individual.

Counterclaim Defendants.

ARBITRAL AWARD

Civil No. 090402548

Judge Samuel David McVey

Arbitrator Craig Metcalf

This Arbitral Award is entered in the above-referenced matter as follows:

I. JURISDICTION

The above-referenced action was initiated on or about July 16, 2009 by the filing of a Verified Complaint with the above-identified court. Following the initiation of proceedings with the Court, on or about November 30, 2009, the parties agreed to a "Stipulated Motion to

Arbitrate.” The Court then executed a “Stipulated Order to Arbitrate” dated December 3, 2009. The “Stipulated Motion to Arbitrate” provided, among other things, that “Plaintiff and Defendant shall proceed as if the Stipulated Order to Arbitrate, filed contemporaneously herewith, is a Notice of Arbitration, as that term is described in the Agreement (namely, the Bulk Programming Services Agreement as issued herein), upon entry of the Stipulated Order to Arbitrate by the Judge.” Stipulated Motion to Arbitrate, Para. 4.

Following the entry of the Stipulated Order to Arbitrate, the parties engaged the undersigned as sole Arbitrator in the above-referenced matter. On December 6, 2010, the parties signed a “Stipulation as to Jurisdiction” whereby the parties stipulated to “having one arbitrator.”

There being no objection or issue raised with regard to jurisdiction or conduct of the arbitration proceedings, including the arbitration hearing, the undersigned FINDS AS FOLLOWS:

1. This dispute was properly referred to arbitration;
2. The arbitral panel was properly appointed and constituted;
3. Jurisdiction to arbitrate this dispute is properly vested in the arbitral panel as constituted, namely a single arbitrator, namely the undersigned.

See, Stipulated Motion to Arbitrate, dated November 25 and 30, 2009; Stipulated Order to Arbitrate, dated December 3, 2009; Stipulation as to Jurisdiction, dated December 6, 2010; Commercial Arbitration Rules of the American Arbitration Association, particularly Rule R-7; 9 U.S.C. §1, et seq; and UCA 78B-11-101, et seq.

II. MOTION IN LIMINE

On or about November 23, 2010 the plaintiff filed a “Motion In Limine Regarding Parties to the Contract.” The Motion was fully briefed by the parties. On December 7, 2010, a hearing on the Motion was held before the undersigned Arbitrator. The parties were represented by counsel at the hearing. By way of the Motion the parties requested that the Arbitrator make certain rulings and construe certain contract provisions. A “Decision” on the Motion In Limine was rendered on December 8, 2010, and is incorporated herein by this reference. See, Exhibit A.

III. SUBSTANTIVE AWARD

An evidentiary arbitration hearing was held in this matter on May 5-6, 2011 at the offices of Kirton & McConkie, Attorneys at Law, 60 E. South Temple, Suite 1800, Salt Lake City, Utah 84111. All parties appeared, were represented by counsel, and presented evidence. The parties had the opportunity to present and question witnesses, to engage in cross-examination of adverse witnesses, and to present documents as evidence. No objection having been heard, the evidentiary hearing was declared closed at 7:18 P.M. on the evening of May 6, 2011. At the request of the Arbitrator, both parties have now submitted post-arbitration briefs.

The parties have not specifically requested a "reasoned award." However, the Arbitrator makes the following "Findings of Fact," "Conclusions," and "Arbitration Award":

FINDINGS OF FACT

1. The parties entered into an agreement dated February 8, 2007 entitled "Bulk Programming Services Agreement," hereinafter the "Agreement."
2. The Agreement outlined the parties' agreement that American Home Systems LLC (hereinafter "Why'rd") would provide internet and television services to Cambria Condominiums, Inc. (hereinafter "Cambria") in exchange for payment of certain fees.
3. The Agreement was drafted by Why'rd.
4. Certain terms of the Agreement have already been construed by the Arbitrator as set forth in the Decision previously entered. *See*, Exhibit A.
5. The Agreement provided that "each tenant to have access to 3 mbps of download throughput, 256 kbps of upload throughput, upon completion of the project. *See*, Agreement, Schedule 2.
6. The project was completed.
7. The Agreement provides that "The estimated bandwidth scale is 1.5 mbps during the first phase; 3 mbps during the second phase." *See*, Agreement, Schedule 2.
8. The Agreement provided that "Guarantee of minimum throughput levels are not available due to the constant fluctuation of utilization throughout the system." Agreement, Schedule 2.

9. The parties have stipulated that "No end user is currently receiving, or has access to, 3 mbps at all times."
10. Bandwidth speeds in the neighbourhood of 0.27 mbps were measured by at least one tenant. Other witnesses testified that this was roughly the typical speeds that they would expect.
11. Other tenants found the internet service to be unusable for normal residential internet use. Tenants testified that the internet was frequently out and that basic functions such as email and blogging were not functional. Long periods of disruption were experienced by tenants.
12. The number one complaint to the Cambria homeowners association was unreliable internet.
13. The Agreement provided that "This system is not designed for the support of high volume or commercial grade servers. The system is designed as a "residential system," meaning that high level of volume that indicates server related activity will be monitored and controlled to preserve the integrity of the system for all of its users."
14. There was no evidence of commercial grade servers being used on the system. There was one example of an internet "hogger," namely Shane Campbell. However, the fact that Mr. Campbell could "hog" the bandwidth is an indication that the system was not in good working order and repair and was not being adequately monitored.
15. The Agreement provided that Why'd would provide the agreed services to Cambria for \$42.20/month per Tenant. The contract in no way indicated what portion of that amount was allocated for internet and what portion was allocated for television. Rather, the Agreement provided a single monthly charge for both internet and television. There is no provision in the contract, for example, for \$6.00 of the amount to be allocated to internet. Rather the Agreement only specifies that the entire package is \$42.20/month/tenant.
16. Television service provided by Why'd was frequently poor and included blank channels, fuzzy channels, missing channels, changing channel numbers and the like. Tenants had no ability to upgrade television service. For example, there was no evidence that any tenant was able to upgrade to HD. Certain tenants supplemented their television service by other means, such as installation of a satellite dish.
17. Cambria tenants logged numerous complaints about poor television service.

18. The Agreement requires that Why'rd " Unless specifically provided in this Agreement or agreed upon in a separate written agreement between the parties, American Home Systems (Why'rd) agrees to keep the System and all related equipment in good working order and repair . . ." Agreement, ¶3.5.
19. Some of the problems in the system could have been alleviated by the installation of a Quality of Service (QOS) device. Such a device was never installed. No adequate bandwidth monitoring or throttling mechanism was installed.
20. The Agreement requires that Why'rd provide customer service 24 hours a day, 365 days a year within a 24 hour period of service request.
21. Many complaints were logged with regard to Why'rd service. Some tenants indicated that they were unable to reach Why'rd at various times.
22. The Agreement provided that "Broadband, internet, and data services will be re-evaluated every two years to ensure that services being offered by American Home Systems (Why'rd) are comparable in price and quality to services being offered to the majority of the general public." Agreement ¶3.7.
23. Why'rd never updated or changed the services being offered to Cambria.
24. Why'rd failed to keep the system competitive within industry standards.
25. Cambria has replaced the services obtained from Why'rd with those of another provider. Cambria is now obtaining higher quality service at the same or lower cost through the new provider.
26. Ownership of the system was retained by Why'rd.
27. Cambria is not currently using the components of the Why'rd system. Television and internet services are being provided to Cambria tenants through alternative means.
28. Cambria is not using any significant portion of the infrastructure installed and owned by Why'rd.
29. The Agreement provided that Why'rd, "if found liable by a court of law, shall be limited to the sum of two hundred and forty dollars (\$240.00) as liquidated damages . . ." Agreement ¶12.

CONCLUSIONS

1. The provision in Schedule 2 that "Guarantee of minimum throughput levels are not available due to the constant fluctuation of the utilization of the system" means the throughput levels of 3 mbps could not be guaranteed at all times. However, the clause is construed in the context of the Agreement to mean that throughput levels near 3 mbps were required, even though temporary periodic fluctuations may result in throughput levels below 3 mbps at times. Based upon testimony at the hearing, this clause is further construed to mean that reductions in throughput levels on the order of roughly 10% could be expected at infrequent intervals, i.e. throughputs of 90% of 3 mbps (2.7 mbps). However, the actual throughput levels provided by Why'rd and experienced by Cambria's tenants were routinely substantially below this range.
2. The throughput levels actually provided by Why'rd were substantially below this 3 mbps threshold. The internet service actually provided was at levels which constituted a material breach of the Agreement.
3. Why'rd has materially breached the Agreement in at least the following particulars:
 - a. Failure to supply a system capacity within the project of 10 mbps to each tenant.
 - b. Failure to provide each tenant with access to 3 mbps of download throughput upon completion of the project.
 - c. Failure to adequately monitor and control the system in order to preserve the integrity of the system for all of its users.
 - d. Failure to take necessary steps to maintain the system in good working order and repair.
 - e. Poor television service.
 - f. Failure to re-evaluate broadband, internet, and data services every two years to ensure that services being offered by Why'rd are comparable in price and quality

to services being offered to the majority of the general public. Whether or not Why'rd actually re-evaluated every two years, the price and quality of the services offered by Why'rd were not comparable to those offered to the general public and this constituted a material breach.

4. Cambria's primary obligation under the Agreement was to make required monthly payments to Why'rd. Those payments were made up until the time Cambria gave notice and terminated the Agreement. Cambria is not in breach.
5. Because of the material breaches of the Agreement by Why'rd, Cambria properly terminated the Agreement and discontinued payments to Why'rd.
6. The customer service provided was marginal and problematic, but the Arbitrator does not specifically find that the low level of customer service constituted a material breach.
7. Cambria has waived, or has not suffered, any damages, other than the \$240.00 in liquidated damages provided for by the Agreement. Defendant's Post Arbitration Brief, pages 60-62.
8. Cambria is not using any significant portion of the infrastructure installed and owned by Why'rd. Cambria is not unjustly enriched by the existence of the infrastructure on Cambria's premises.

ARBITRATION AWARD

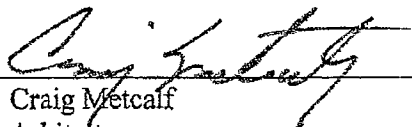
The Arbitrator makes the following award:

1. The Arbitrator finds for Cambria on each of the claims of the Complaint.
2. The Arbitrator finds for Cambria on the claims of the Counterclaim.
3. Cambria is awarded \$240.00 as liquidated damages. No further damages are awarded to either party.
4. Cambria is awarded its costs of arbitration, including the costs of the record or transcript, administrative fees, and all other fees of the arbitration, including the fees of the Arbitrator.

5. There being no attorneys' fees provision in the Agreement, each party shall bear its own attorneys' fees.
6. The Arbitrator recommends that the Court enter an order allowing Why'rd 30 days to remove its property from Cambria's premises in a way that does not adversely affect the real property of Cambria.

DATED this 28 day of June, 2011.

KIRTON & McCONKIE

By: 
Craig Metcalf
Arbitrator

CERTIFICATE OF SERVICE

I hereby certify that on the 28th day of June, 2011, I caused to be delivered by the method indicated below a true and correct copy of the foregoing to the following:

<input checked="" type="checkbox"/>	U.S. MAIL	Justin D. Heideman
<input type="checkbox"/>	HAND DELIVERY	HEIDEMAN, MCKAY, HEUGLY & OLSEN
<input type="checkbox"/>	FAX TRANSMISSION	2696 N. University Avenue, Suite 180
<input type="checkbox"/>	FEDERAL EXPRESS	Provo, Utah 84604
<input checked="" type="checkbox"/>	E-MAIL	
<input checked="" type="checkbox"/>	U.S. MAIL	Cole S. Cannon
<input type="checkbox"/>	HAND DELIVERY	CANNON LAW GROUP, PLLC
<input type="checkbox"/>	FAX TRANSMISSION	455 East 400 South, #400
<input type="checkbox"/>	FEDERAL EXPRESS	Salt Lake City, Utah 84111
<input checked="" type="checkbox"/>	E-MAIL	

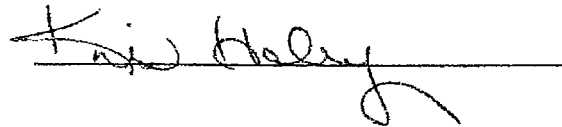


EXHIBIT A

IN THE FOURTH JUDICIAL DISTRICT COURT

IN AND FOR THE STATE OF UTAH, UTAH COUNTY

ARBITRATION CONDUCTED BY CRAIG METCALF OF KIRTON & McCONKIE

AMERICAN HOME SYSTEMS, LLC. Dba
WHY'RD, a Utah Corporation,

Plaintiff,

v.

CAMBRIA HOMEOWNERS ASSOCIATION,
INC., a Utah non-profit Corporation,

Defendant.

CAMBRIA HOMEOWNERS ASSOCIATION,
INC., a Utah non-profit Corporation,

Counterclaim Why'rd

v.

AMERICAN HOME SYSTEMS, LLC. Dba
WHY'RD, a Utah Corporation, MIKE BURNETT,
an individual, and JUSTIN BURNETT, an
individual.

Counterclaim Defendants.

DECISION

Civil No. 090402548

Judge Samuel David McVey

Arbitrator Craig Metcalf

DECISION ON MOTION IN LIMINE REGARDING PARTIES TO THE
CONTACT

American Home Systems, LLC, dba Why'rd (hereinafter "Why'rd") has brought a Motion in Limine Regarding the Parties to the Contract (hereinafter "Motion") in this arbitration. Why'rd and defendant Cambria Homeowners Association, Inc. (hereinafter "Cambria") have each submitted memoranda related to the Motion. A hearing on the Motion was held on December 7, 2010 at which time both parties appeared and presented argument.

This Decision is in response to the Motion, and in response to related requests from the parties for certain contract construction and interpretation. The "terms" referred to below are terms used within the Agreement.

The Arbitrator finds as follows:

1. The contract in question is a "Bulk Programming Services Agreement," dated February 8, 2007 (hereinafter "Agreement"). The parties to the Agreement are American Home Systems, LLC and Cambria Condominiums, Inc. as set forth on the face of the Agreement. Individual home owners within the Cambria project are not parties to the Agreement or to these proceedings. During the hearing, the parties stipulated that Why'rd and Cambria are the parties to the Agreement.
2. Why'rd "created the contract" and is the author of the Agreement. Why'rd Memorandum, p. 5.
3. The term "Subscriber" means Cambria Condominiums, Inc. or its successors in interest.
4. The term "Tenant" means: (i) for a Multiple Dwelling Unit system, *each individual unit at the property*, (ii) for a Guest Property each television and other viewing unit in each Guest Property. The term "tenant" as used in the Agreement refers to a dwelling unit or Guest Property. Accordingly, the term "tenant" means a structure or housing unit, as defined above. Agreement, ¶1, Definitions. The only sections which may indicate that a Tenant is a person are ¶7 related to billing and payment and ¶14 entitled "Relationship of the Parties." However, those sections do not change any other interpretation of the terms of the Agreement and particularly that the term Tenant refers to an individual unit at the property.

Cambria represents in its memorandum that there are 303 dwelling units. Each of those units is a "tenant" for purposes of this Agreement. This conclusion is further supported by the statement in the Agreement's definition of "Tenant" which reads:

"Each Tenant shall be considered a 'Drop,'" taken together with the statement under the definition of "Total Number of Households Passed" which reads: "Each 'Household Passed' shall be considered a 'Drop.'" *See also*, Agreement ¶7.1.

5. "Subscriber" and "Tenant" are distinct terms and are not synonymous. At certain places in the Agreement the term "Subscriber" is used alone. *See*, e.g. Para. 3.3, 4.1, 9. At certain places in the Agreement the term "tenant" is used alone. *See*, e.g. Schedule 2. Elsewhere in the Agreement the terminology "Subscriber and Tenant" is used. *See*, e.g. Para's 3.6, 4.3.
6. Why'rd's purpose under the Agreement was/is to provide the necessary infrastructure and service so that Cambria had broadband internet access and televisions services. Why'rd Memorandum, p. 5.
7. The Agreement provides that Why'rd maintains sole ownership of the System at the Property. The term "System" means a coaxial, fiber optic or hybrid fiber optic, SMATV, MMDS, 5-900MHz or 18 GHZ multi-channel audio, video, data, internet, broadband services distribution system." *See*, Definitions.
8. Schedule 2 of the Agreement provides that system capacity within the project is "10mbps to each tenant." As defined above, tenant is each individual unit at the property. Thus, the Agreement provides that each individual unit at the property shall have a coaxial, fiber optic or hybrid fiber optic, SMATV, MMDS, 5-900MHz or 18 GHZ multi-channel audio, video, data, internet, broadband services distribution system capacity of 10 mbps.
9. The Agreement provides that bandwidth will be scaled or phased to each tenant. The Agreement requires that the estimated individual bandwidth scale be 1.5 mbps during the first phase; 3 mbps during the second phase.
10. Nevertheless, Schedule 2 provides that "Guarantee of minimum levels are not available due to the constant fluctuation of utilization throughout the system." The impact of this statement on the statement discussed in the immediately preceding paragraph 9 is still open to interpretation. The Arbitrator is not prepared to rule on the combined meaning of those two sentences at this stage in the proceedings. Accordingly, the Arbitrator would invite the parties to submit, at a time and place to be agreed, evidence and/or argument on the combined effect of these two sentences of the Agreement.

11. The System is defined as a residential system. The system, therefore, was not intended for high volume or commercial grade servers.

12. The service was provided to Subscriber for \$42.20 per month per Tenant. As discussed above, Tenant means each dwelling unit. Accordingly, the Agreement contemplated a charge to Subscriber of \$42.20 per month for each dwelling unit served.

The Arbitrator believes that the Decision above adequately addresses the issues posed in Why'rd's Motion.

All previously scheduled dates in this arbitration are stricken. The Arbitrator invites the parties to contact Arbitrator's office to schedule further proceedings as necessary.

DATED this 8th day of December, 2010,

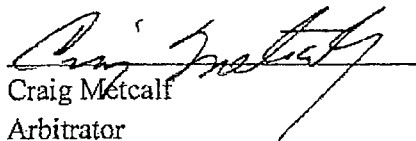

Craig Metcalf
Arbitrator

EXHIBIT 3

BULK PROGRAMMING SERVICES AGREEMENT

This Bulk Programming Services Agreement ("Bulk Agreement") is entered into by and between American Home Systems LLC, a Utah limited liability company located at 12227 South Business Park Dr., Sandy, Utah 84020 and the ("Subscriber") identified below. This Bulk Agreement includes the following Attachments, the terms and conditions of which are hereby incorporated by reference in their entirety:

Schedule 1 - Television Service
Schedule 2 - Broadband Service
Schedule 3 - Bulk Agreement Pricing

SUBSCRIBER:

Legal Name of Entity: Cambria Homeowners Assn., Inc
Type of Entity: Corporation
State of Formation: Utah
D/B/A: _____
Address for Notices: 758 South 400 East
Orem, UT 84047
Facsimile: (801) 227-0129
Telephones: (801) 227-0550
Property Name: Cambria
Property Address: 1300 West 170 North, Pleasant Grove, UT 84062

NOTE: THIS AGREEMENT MUST BE COMPLETED FOR EACH PROPERTY.

Effective Date: Feb 15, 2005 (To be completed upon execution)
(Month) (Day) (Year)

Expiration Date of Initial Term: Feb 15, 2012 (To be completed upon execution)
(Month) (Day) (Year)

In witness whereof, American Home Systems and "Subscriber" have caused their duly authorized representatives to execute this Agreement as of the Effective Date set forth above.

AMERICAN HOME SYSTEMS LLC.

By: Justin Burnett
(authorized signature)

Printed Name: Justin Burnett

Title: Member

SUBSCRIBER

By: William L. Montgomery
(authorized signature)

Printed Name: William L. Montgomery

Title: Chief Financial Officer

Initial: American Home Systems AS Subscriber WM

1. Definitions.

"Affiliate" means a company, person or entity directly or indirectly controlling, controlled by, or under common control with another company, person or entity.

"Bulk Programming" or "American Home Systems Programming" means any video, audio, data, internet, or broadband programming service delivered to the Property.

"Multiple Dwelling Unit" means a building located in the Territory subdivided into two or more individual single family residential dwelling units, which consists solely of apartment complexes, condominiums, townhomes, or residential dormitories.

"Property" means the Multiple Dwelling Unit(s) or Guest Property referenced on the first page of this Agreement which is receiving American Home Systems Programming pursuant to this Agreement.

"Property Agreement" means the right of entry or other similar type agreement which allows American Home Systems access to the Property and the ability to distribute video and audio programming services to residents of the Property.

"Subscriber" means, for purposes of this Agreement only, the managing authority, business entity, or association that controls, represents, and manages the Property and Tenants that dwell therein.

"Tenant" means, for purposes of this Agreement only, each of the following: (i) for a Multiple Dwelling Unit system, each individual dwelling unit at the Property, (ii) for a Guest Property, each television and other viewing unit in each Guest Property. In any event, the term Tenant will not include any connection not authorized pursuant to this Agreement. Each Tenant shall be considered a "Drop".

"System" means a coaxial, fiber optic or hybrid fiber optic, SMATV, MADS, 5-300MHz or 18 GHz multi-channel audio, video, data, internet, broadband services distribution system owned and managed by American Home Systems, which serves the Property.

"Total Number of Households Passed" shall be determined by the cumulative count of all dwelling units at the Property which are occupied or qualify for a Certificate of Occupancy as provided by a governing authority or building inspector which must be provided to American Home Systems upon request. Each "Household Passed" shall be considered a "Drop".

2. Term. The initial term of this Agreement begins on the Effective Date and terminates on the Expiration Date set, each as set forth on the first page of this Agreement ("Initial Term"). After the Initial Term set forth on the first page, this Agreement will renew automatically for successive one (1) year terms ("Renewal Term") unless either Party gives written notice of non-renewal to the other at least ninety (90) days before the end of the Initial Term or any Renewal Term. The "Term" of this Agreement is the Initial Term plus any number of Renewal Terms.

3. American Home Systems Responsibilities.

3.1 Programming. American Home Systems will provide the Bulk Programming and headend receiving equipment, to be installed at the Property, for distribution to Tenants at the Property. Once a programming package is approved by Subscriber, American Home Systems shall provide such package to all units at the Property regardless of occupancy status. The same basic programming package will be offered to all tenants. Subscriber acknowledges that the owners/distributors of Bulk Programming, rather than American Home Systems, determine the content of the Bulk Programming, and as a result American Home Systems shall have no responsibility or liability for Bulk Programming content. As between American Home Systems and Subscriber, or American Home Systems and any Tenant, American Home Systems has the sole right to edit, select, schedule and determine the American Home Systems Programming services contained in the American Home Systems Programming packages, and to determine and change fees charged to Subscriber for such American Home Systems Programming. If and when such changes are made, American Home Systems shall not degrade the quality or mix of programming and shall replace deleted channels with others of similar quality. Any rate increases shall not exceed six percent per year without written consent of the subscriber. American Home Systems may add, delete, or modify the Bulk Programming from time to time in its sole discretion and will notify Subscriber of the addition or deletion of available Bulk Programming, which may be caused, among other things, by satellite programming industry changes, deletions, additions, or the termination, modification or replacement of American Home Systems programming agreements. Any changes to the Bulk Programming shall be effective upon notification by American Home Systems.

3.2 Satellite and Broadband Delivery.

3.2.1 American Home Systems may distribute Bulk Programming signals via satellites owned, leased, operated or otherwise accessed by EchoStar or Affiliates of EchoStar as currently constituted or from such satellites and at such orbital locations as may be added to the EchoStar fleet at any time and from time to time as determined by EchoStar in its sole discretion.

3.2.2 American Home Systems has the right, without liability, to interrupt transmission of Bulk Programming (A) whenever required under the terms of an applicable programming or other agreement (for example, when required for blackouts of sports events), and (B) when reasonably necessary, as determined by American Home Systems, for testing or maintenance, so long as American Home Systems uses commercially reasonable efforts to minimize disruption of the Systems' delivery of Bulk Programming to Subscribers (for example, by conducting the interruptions during overnight hours or periods of low usage).

3.3 Authorizations. American Home Systems will authorize receipt of Bulk Programming in accordance with American Home Systems' standard procedures, but it will be Subscriber's responsibility to instruct American Home Systems when a unit is to be authorized or de-authorized for a System.

3.4 Compliance with Subscriber Requests. American Home Systems will have no liability to Subscriber, or any tenant, or any third party arising out of American Home Systems' fulfillment of any request or response to any instructions which has been reasonably given, whether or not

Initial American Home Systems *[Signature]* Subscriber *[Signature]*

such request or instructions were given in writing (including, without limitation, instructions relating to authorization or de-authorization of Bulk Programming).

3.5 Responsibility for Systems and Costs. American Home Systems will purchase, install, repair, maintain and operate the System at the Property, including without limitation headend equipment, for receipt, decoding and distribution of Bulk Programming to Subscriber which may include, but are not limited to, IRDs, de-scrambling equipment, multi-switches, racks, combiners, splitters, and amplifiers. Unless specifically provided in this Agreement or agreed upon in a separate written agreement between the parties, American Home Systems agrees to keep the System and all related equipment in good working order and repair, and will be responsible to ensure that scrambling/de-scrambling equipment, firewalls and encryption technology is utilized within its System to prevent piracy of any Bulk Programming, or unauthorized usage of data circuits.

3.6 Customer Service. Unless otherwise agreed upon in a separate writing between the Parties, American Home Systems will be responsible for the purchase and installation of all equipment related to its Systems and day-to-day service contact with Subscriber and Tenants. American Home Systems will: (i) maintain an incoming service telephone line that accepts trouble reports and billing and other inquiries from Subscriber and Tenants, 24 hours a day, 365 (or 366) days a year; (ii) respond to each Subscriber or Tenants trouble call, inquiry, and installation or service request within a 24 hour period; (iii) install and maintain the system in a commercially reasonable manner and to industry standards; (iv) have available maintenance and service parts specified for the system.

3.7 Broadband, internet, and data services will be re-evaluated every two years to ensure that services being offered by American Home Systems are comparable in price and quality to services being offered to the majority of the general public.

4. Subscriber Responsibilities.

4.1 Payments. Subscriber is responsible for invoicing and collecting payments from individual units for receipt of Bulk Programming.

4.2 Authorizations. Subscriber shall immediately notify American Home Systems in writing if Subscriber receives notice that may affect American Home Systems ability to provide American Home Systems Programming to the Property.

4.3 Exclusivity. Subscriber agrees that the American Home Systems Programming will be the sole and exclusive multi-channel video, audio, data, internet, and broadband programming services to Subscriber and Tenants at the Property, without regard to the means of delivery of such programming service, except that Property may offer: 1) local off-air television signals via off-air antenna or via another transport technology only, and 2) other programming that is not offered or available from American Home Systems, provided, however, if such programming becomes available from American Home Systems, Subscriber agrees to use its best efforts to purchase such programming from American Home Systems. Subscriber agrees to purchase such programming from American Home Systems once any existing agreement for such programming has either terminated or expired and Subscriber further agrees to not renew any existing agreement for such programming. Subscriber agrees that it will not receive any of the programming channels which comprise any of the Bulk Programming packages from any third party, including without limitation, cable distribution, C-band or DBS. Notwithstanding, the Subscriber or Tenant may purchase internet data or broadband service as an addition to service provided by American Home Systems.

4.4 Redistribution Prohibited. Subscriber agrees that it will take reasonable precautions to prevent and not knowingly allow other person(s) or entities, directly or indirectly to, (i) reproduce, resell, retransmit, rebroadcast or otherwise redistribute in any manner or form any Bulk Programming, or (ii) make any modification, addition or deletion to any of the Bulk Programming. If Subscriber becomes aware that any unauthorized party is receiving, transmitting or exhibiting any part of the Bulk Programming, Subscriber will notify American Home Systems in writing of the name and address of such party. Further, if any such activities are in any way related to Subscriber or its operations, including but not limited to any rights or obligations under this Agreement, then Subscriber will immediately notify American Home Systems of such activity and cooperate with American Home Systems in preventing any continuance of such activities. This subsection does not apply to the recording, after receipt by a Subscriber, of Bulk Programming by private individuals for in-home viewing only.

4.5 Exhibition.

4.5.1 Subscriber will ensure that premium, or pay-per-view programming is not exhibited in any common areas at the Property such as reception areas, waiting areas, fitness rooms, or such other areas.

4.5.2 Subscriber will not permit the exhibition of any Bulk Programming at a public place where a cover charge or other admission fee is charged to individuals to view the Bulk Programming, unless specifically authorized in writing by American Home Systems.

4.6 Obligations to Programmers. Upon notice thereof, Subscriber will comply with all requirements established by Programmers and communicated to Subscriber, including but not limited to blackout requirements and commercial exhibition restrictions. American Home Systems may blackout or otherwise modify programs to comply with programmers agreements or governmental requirements.

4.7 Signal Theft/Unauthorized Access. Subscriber shall not directly or indirectly: (i) engage in any signal theft, piracy, unauthorized browsing or similar activities; (ii) engage in any unauthorized reception, transmission, publication, use, display or similar activities with respect to Bulk Programming; (iii) alter any American Home Systems equipment or "Smart Cards", or any other equipment compatible with programming delivered by American Home Systems or any of its Affiliates to be capable of signal theft (or for any other reason without the express written consent of American Home Systems); (iv) manufacture, import, offer to the public, sell provide or otherwise traffic in any technology, product, service, or device which is primarily designed or produced for the purpose of, or is marketed for use in, or has a limited commercially significant purpose other than, assisting in or facilitating signal theft, unauthorized browsing or other piracy; or (v) aid any others in engaging in, or attempting to engage in, any of the above prescribed activities. Operator shall immediately notify American Home Systems if it becomes aware of any such activity by any person or entity and agrees to cooperate with American Home Systems in the prosecution of any such activities including providing any documentation requested by American Home Systems related to such activities.

5. Equipment.

5.1 Ownership of Equipment. American Home Systems maintains sole ownership of the System at the Property, unless specifically agreed upon in a separate written agreement between the parties, including without limitation, headend equipment for receipt, decoding and distribution of Bulk Programming to Subscribers which may include, but are not limited to, IRDs, de-scrambling equipment, multi-switches, racks, combiners,

Initial: American Home Systems 2/21 Subscriber EW

splitters, amplifiers, conduits, cabling, and wiring infrastructure. American Home Systems agrees to keep the System and all related equipment in good working order and repair, and will be responsible to ensure that scrambling/descrambling equipment, firewalls, and encryption technology is utilized within its System to prevent piracy of any Bulk Programming. At the completion of the initial term of service, American Home Systems will make no further exclusive claim of ownership to the underground conduit, cables, and wiring.

6. Reports.

6.1 Other Reporting. Subscriber will comply promptly with other reasonable reporting requirements adopted from time to time by American Home Systems to facilitate compliance with legal requirement or with Programming Agreements.

7. Fees, Invoices, and Payments.

7.1 Programming Service Rates. Subscriber agrees to pay monthly to American Home Systems the rates per Unit (per Drop) per month for the Bulk Programming package selected multiplied by the number of units which maintain a certificate of occupancy, and other applicable charges for Bulk Programming distributed to Subscriber and Tenants at the Property. For purposes of this Agreement, the total number of Tenants and the Total Number of Households Passed, shall be the same for purposes of calculating amounts due to American Home Systems. American Home Systems may change or modify the programming selection, Programming Service Rates, and other charges at any time and from time to time in American Home Systems' sole discretion upon notice to Subscriber. Any such changes shall not significantly reduce the overall number, quality or mix of programming being offered. No increase in service rates shall exceed six percent per year without the written consent of the subscriber. Any changes to programming, Programming Service Rates, or other charges shall be effective upon notification by American Home Systems.

7.2 Invoices. American Home Systems will invoice Subscriber monthly in advance for the Programming Service Rates and other charges payable with respect to Bulk Programming distributed to Units at the Property. The first invoice will be for two calendar months and each subsequent invoice will be for one month. The Subscriber is expected to activate programming at the Property between the 22nd and 31st of the month. Any activation occurring from the 1st of the calendar month through the 21st of the calendar month will incur charges for the entire calendar month in which they activate with no proratations.

7.3 Payments. American Home Systems shall invoice Subscriber for American Home Systems Programming charges and Subscriber shall pay to American Home Systems the full amount of each such invoice (irrespective of Subscriber's ability to collect any amounts from Tenants), within 20 (twenty) days of invoice date. Any late payment shall (i) be subject to disconnect (ii) accrue interest at the rate of 1.5% per month until paid in full, and Subscriber agrees to pay all interest charges due and payable by Subscriber hereunder. Subscriber agrees that it is solely responsible for: (i) payment of the invoices according to the payment terms set forth in this Agreement; (ii) collection of all amounts from Tenant Accounts; (iii) all billing of Tenant Accounts; and (iv) handling all billing disputes with Tenant accounts. Any account that is hard disconnected will be subject to a restart fee required for resumption of service. Subscriber will pay all Programming Service Rates and other charges due whether or not Subscriber collects such Programming Service Rates and other charges from Tenants. American Home Systems' failure to submit an invoice does not relieve Subscriber of its obligation to pay all amounts owed on a timely basis, unless otherwise agreed in writing. Subscriber may not offset any payments to American Home Systems against payments otherwise due from American Home Systems.

7.4 Credit Ability to Pay. Subscriber authorizes and will cooperate with American Home Systems to obtain a credit report regarding Subscriber at any time. Subscriber releases from all liability all persons, companies and credit reporting agencies supplying credit information. Unless American Home Systems has approved Subscriber for credit terms, Subscriber may be required to deliver to American Home Systems, prior to the initial delivery of Bulk Programming to a Property, a security deposit in an agreed upon amount. Any such security deposit will be held, without accrual of interest, as security for the payment in full of all amounts due hereunder and will not be applied to current invoices. If any security deposit is applied to amounts due hereunder, then Subscriber will be required to reimburse such deposit in order to continue delivery of Bulk Programming.

7.5 Taxes. Subscriber will pay all taxes or other governmental fees, including, but not limited to, payment of all federal, state, local, and user taxes, franchise fees and other charges, if any, which are now or may in the future be assessed. Tax certificates must be filed at American Home Systems for any equipment and/or programming exemptions.

7.6 Finality of Billing. Thirty (30) days after any amounts are due under this Agreement, all charges and computations by American Home Systems relating to those amounts will be deemed final and uncontested by Subscriber, unless earlier disputed by Subscriber in writing to American Home Systems and diligently pursued to resolution. American Home Systems' acceptance of a payment will not be an accord that the amount paid is in fact the correct amount, and acceptance of a payment will not release any claim by American Home Systems for additional amounts due.

7.7 Nonpayment and Non-Compliance Consequences. In addition to any other rights and remedies available at law or in equity, American Home Systems will have the following cumulative rights:

7.7.1 If Subscriber fails to pay or report to American Home Systems any amounts owed under this Agreement when due or otherwise fails to comply with any provision of this Agreement with regard to a particular Property, American Home Systems may: (a) immediately de-authorize all or any portion of Subscriber's Bulk Programming for that Property; (b) give notice of material breach of this Agreement; or (c) both. If some or all of the Bulk Programming is de-authorized for this reason, and is later reauthorized by mutual Agreement of American Home Systems and Subscriber, Subscriber will pay a reauthorization fee sufficient to pay American Home Systems its standard service fees to de-authorize, and service fees to reauthorize said programming including the costs that may be charged by third parties that are a direct or indirect expense to American Home Systems, or that result in an income loss to American Home Systems as a result of subscribers' non-performance as herein set forth.

7.7.2 If American Home Systems refers the collection of any past due amounts to an agency or attorney, Subscriber will pay all collection expenses, including attorney's fees, upon American Home Systems' request.

8. Compliance With Legal Requirements. Subscriber covenants and agrees that it will comply with any and all local, state or Federal laws, rules, regulations, licensing requirements, or valid orders of an administrative agency or court of competent jurisdiction in connection with the performance of its obligations under this Agreement or otherwise ("Legal Requirements"). Subscriber further covenants and agrees that it will obtain and maintain

Initial: American Home Systems 78 Subscriber W

all permits, licenses, permissions, and rights which may be required under any applicable legal requirements or otherwise for the performance of its obligations pursuant to this Agreement.

9. **Representations and Warranties.** Subscriber represents and warrants that its execution of this Agreement and the performance of its obligations under this Agreement has been properly authorized by all necessary corporate, partnership or other action, and does not and will not violate any legal requirements applicable to it or result in a breach of or default under any other agreement binding upon it. Subscriber further represents that (i) it is a valid and existing entity in compliance with all laws and regulations related to maintenance of its corporate or other business status; (ii) it is not currently insolvent; (iii) it is not knowingly violating any federal, state or local law or regulation.

10. **Notices.** All notices and communications given hereunder will be in writing, will be properly addressed and will be deemed given only as follows or in such other manner as may be mutually agreed upon by the Parties in writing: (i) if personally delivered, upon receipt or refusal of delivery, or (ii) if mailed by certified mail, return receipt requested, or registered mail, upon receipt or refusal of delivery, or (iii) if sent by facsimile, upon independent electronic acknowledgement of receipt, or (iv) if sent by reputable overnight delivery service, on the next business day following delivery to such service. Until notice to the contrary is given in accordance with this Section, the Parties' notice information is as listed on the first page of this Agreement.

11. **Breach; Termination, and Bankruptcy.** If subscriber fails to pay any amount herein provided within thirty (30) days after the same is due and payable, or if subscriber fails to perform any other provision hereof within thirty (30) days after the same is due and payable, or if subscriber fails to perform any other provision hereof within thirty (30) days after American Home Systems shall have requested in writing performance thereof, or if any proceeding requested in writing performance thereof, or if and proceedings in bankruptcy, receivership or insolvency shall be commenced by or against subscriber or his property, or if subscriber makes any assignment for the benefit of creditors, American Home Systems shall have the right but shall not be obligated to exercise any one or more of the following remedies: (a) recover existing amounts due from the subscriber and continue to provide bulk programming and internet services herein specified, in which case American Home Systems shall be entitled to recover, in addition, the monthly amounts due under the contract for said bulk programming and internet services; or (b) discontinue providing bulk programming and internet services and recover from the subscriber all sums that American Home Systems may be entitled to under law. In addition, in the event that subscriber shall be delinquent in the payment of the periodic bulk programming and internet service charge, subscriber agrees to pay to American Home Systems a late charge in the maximum amount permitted by Utah state law from the date of the delinquency.

12. **American Home Systems is not an insurer.** It is understood and agreed that American Home Systems is not an insurer; that insurance, if any, shall be obtained by the Subscriber or Tenant and that payments provided for herein are based solely on the value of the bulk programming and internet services as set forth herein and are unrelated to any value that the Subscriber, tenant, or any other third party may derive from said services. The Subscriber acknowledges and agrees that because of the uncertain value, if any, that the Subscriber or any third party may derive from services herein offered, it would be impractical and extremely difficult to fix the actual damages, if any, which may proximately result from negligence, or failure to perform any of the obligations herein resulting in loss to the subscriber or any third party. American Home Systems liability, if found liable by a court of law, shall be limited to the sum of two hundred and forty dollars (\$240.00) as liquidated damages and not as a penalty, and this liability shall be exclusive. If Subscriber or Tenant wishes American Home Systems to assume a limited liability in lieu of the liquidated damages as herein above set forth, Subscriber or Tenant may obtain from American Home Systems a higher limitation of liability by paying an additional charge to American Home Systems. If Subscriber or Tenant elects to exercise this option, a rider shall be attached to this agreement setting forth the terms, conditions, and amount of the limited liability and the additional charge. Such rider and additional obligation shall in no way be interpreted to hold American Home Systems as insurer.

13. **Confidentiality; Press Releases.** Subscriber will not disclose (whether orally or in writing, by press release or otherwise) to any third party any information with respect to the provisions of this Agreement, any information contained in any data or report required or delivered hereunder, or any materials related thereto, except: (a) to its officers, directors, employees, auditors and attorneys who have a need to know such information (collectively), in their capacity as such, but such necessary personnel must agree to abide by the provisions of this Section and Subscriber will be responsible for any breach of the provisions of this Section by such necessary personnel; (b) to the extent necessary to comply with Legal Requirements; (c) to comply with its obligations under this Agreement; or (d) as agreed by American Home Systems in writing. This Section will survive, indefinitely, the expiration, termination or assignment of this Agreement.

14. **Relationship of the Parties.** This Agreement is a commercial contract between Subscriber and American Home Systems and the relationship of the parties hereto is that of independent contractor. Nothing in this Agreement will be deemed to make the Parties partners or joint venturers or in any way imply any duties by one Party to the other except as expressly provided in this Agreement and neither Party will by virtue of anything in this Agreement be liable for the obligations of the other Party whether hereunder or to any third party. This Agreement binds the Parties and their permitted successors and assigns. No Tenant or other person will be entitled to rely on this Agreement.

15. **Assignees and Subcontractors of American Home Systems** shall have the right to assign this agreement to any other person, firm or corporation without notice to Subscriber and shall have further right to subcontract any services which it may perform. Subscriber acknowledges that this Agreement, and particularly those paragraphs relating to American Home Systems' maximum liability, liquidated damages, and third party

Initial: American Home Systems *AS* Subscriber *LS*

indemnification, insura to the benefit of and are applicable to any assignees, or subcontractors, or both, and that they bind Subscriber with respect to said assignees, or subcontractors, or both with the same force and effect as they bind Subscriber to American Home Systems.

16. **Trademarks.** Subscriber acknowledges that the names, marks, trademarks and logos of American Home Systems, EchoStar, the DISH Network, EchoStar Communications Corporation and its Affiliates, the Programmers, the titles of programs contained in the American Home Systems Programming, and any variations incorporating them ("Marks"), are the exclusive property of their respective owners, and Subscriber has no and will acquire no proprietary rights to the Marks by reason of this Agreement. Subscriber has and will have no rights to use the Marks except at the times and in a manner expressly communicated to Subscriber by American Home Systems and the owner of a particular Mark. Subscriber will not publish or disseminate any material that violates this paragraph or any restrictions imposed by American Home Systems, the owner of a particular Mark or a Programmer.

17. **Choice of Law; Venue; Consent to Jurisdiction; Arbitration.** The relationship between the parties and their present and future Affiliates, including without limitation all disputes, controversies or claims, whether arising in contract or under statute, shall be governed by and construed in accordance with the laws of the State of Utah, applicable to contracts to be made and performed entirely within the State of Utah by residents of the State of Utah, without giving any effect to its conflict of law provisions. The parties hereby agree that venue and jurisdiction in Utah is appropriate for all claims and controversies arising out of, or in any way related to, this Agreement. Any and all disputes, controversies or claims between Subscriber and American Home Systems arising out of or in connection with this Agreement, which are not settled through negotiation, shall be resolved solely and exclusively by binding arbitration in accordance with both the substantive and procedural laws of Title 9 of the U.S. Code ("Federal Arbitration Act") and the Commercial Arbitration Rules of the American Arbitration Association. In the event of any conflict between the Federal Arbitration Act and the Commercial Arbitration Rules of the American Arbitration Association, the Federal Arbitration Act will control. Arbitration proceedings shall be initiated by written notice from the initiating party to the other party stating the initiating party's intent to initiate arbitration ("Notice of Arbitration"). The Arbitration shall be conducted in the City and County of Salt Lake City, Utah by a panel of three arbitrators who shall be selected as follows: (i) one arbitrator shall be selected by the claimant(s) within 30 days of sending the Notice of Arbitration; (ii) one arbitrator shall be selected by the respondent(s) within 30 days of the claimant(s) notifying respondent of the identity of claimant's arbitrator; and (iii) the third arbitrator shall be selected by the arbitrators chosen by the claimant(s) and the respondent(s) within 30 days of their appointment. The decision of the arbitrators shall be final and binding on the parties and any award of the arbitrators may be entered and enforced as a final judgment in any state or Federal court of competent jurisdiction in the United States. The parties agree that, in no event, shall the arbitrators' decision include a recovery under any theory of liability, or award in any amount, not expressly allowed under this Agreement. The cost of any arbitration hereunder, including without limitation the cost of the record or transcripts thereof, if any, administrative fees, and all other fees involved, shall be paid by the party(ies) determined by the arbitrators to not be the prevailing party(ies), or otherwise allocated in an equitable manner as determined by the arbitrators. Nothing contained herein shall limit or restrict the rights of either party and/or its Affiliates to file a Notice of Arbitration and/or bring a request for injunctive relief against the other party.

18. **Entire Agreement.** This Agreement, together with all Addenda, exhibits and schedules thereto, constitutes the entire Agreement between the Parties, and supersedes all previous understandings, commitments or representations concerning the subject matter of this Agreement. All such previous understandings, commitments or representations concerning the subject matter of this Agreement are set forth herein. Each Party acknowledges that the other has not made any representations other than those contained in this Agreement. Except as provided in this Agreement, this Agreement may not be amended or modified, and none of its provisions may be waived, except by a writing signed by an authorized officer of the Party against whom the amendment, modification or waiver is sought to be enforced. If any portion of this Agreement is held to be unenforceable, then the remainder of the Agreement will survive and will be construed as well as possible to reflect the intent of the parties.

19. **Force Majeure.** American Home Systems shall be excused from performance, and shall not have any liability to Subscriber or any other person or entity, with respect to any failure of American Home Systems to perform its obligations under the provisions of this Agreement if such failure is due to a Force Majeure event including without limitation any labor dispute, fire, flood, earthquake, riot, legal enactment, governmental regulation, Act of God, equipment failure, cable cut, any problem associated with the construction, use or operation of satellite(s), transponder(s) or related systems such as uplink facilities or equipment, interference from other communications systems, solar flares or other such anomalies, degradation or interruption of protection systems, the failure of a Programmer to make its programming available, any problem associated with any scrambling/descrambling equipment or any other equipment owned or maintained by American Home Systems or others, action or order of any judicial, legislative, governmental or quasi-governmental authority, or any cause beyond American Home Systems' reasonable control.

20. **Limitation on Damages.** IN NO EVENT WILL AMERICAN HOME SYSTEMS BE LIABLE TO SUBSCRIBER, OR ANY PERSON CLAIMING THROUGH SUBSCRIBER, FOR ANY LOSS OF PROFITS, LOSS OF BUSINESS, INDIRECT, CONSEQUENTIAL, PUNITIVE, EXEMPLARY, SPECIAL, INCIDENTAL OR OTHER SIMILAR DAMAGES, WHETHER FORESEEABLE OR NOT, INCLUDING WITHOUT LIMITATION ANY PAYMENT FOR LOST BUSINESS, FUTURE PROFITS, LOSS OF GOODWILL, REIMBURSEMENT FOR EXPENDITURES OR INVESTMENTS MADE OR COMMITMENTS ENTERED INTO, CREATION OF CLIENTELE, ADVERTISING COSTS, TERMINATION OF EMPLOYEES OR EMPLOYEES SALARIES, OVERHEAD, EQUIPMENT OR FACILITIES INCURRED OR ACQUIRED BASED UPON THE BUSINESS DERIVED OR ANTICIPATED UNDER THIS AGREEMENT. IN NO EVENT SHALL AMERICAN HOME SYSTEMS HAVE ANY LIABILITY TO SUBSCRIBER FOR ANY OUTAGE OR DISRUPTION IN AMERICAN HOME SYSTEMS PROGRAMMING IN EXCESS OF THE APPLICABLE AMOUNT THAT WOULD HAVE BEEN CHARGED TO OPERATOR FOR SUCH PROGRAMMING DURING SUCH TIME OF OUTAGE OR DISRUPTION. IN ADDITION, AMERICAN HOME SYSTEMS SHALL HAVE NO LIABILITY TO SUBSCRIBER FOR ANY ACT OR OMISSION OF ANY PROGRAMMER OR THIRD PARTY PROVIDER OF SERVICES IN CONNECTION WITH AMERICAN HOME SYSTEMS' DELIVERY OF PROGRAMMING.

Initial: American Home Systems 7/23 Subscriber 1/10

21. General.

21.1. *No Implied Waiver.* Except as expressly provided in this Agreement, no failure or delay by either Party to exercise any right, power or privilege under this Agreement will operate as a waiver, nor will any single or partial exercise of any right, power or privilege preclude any other or further exercise thereof or the exercise of any other right, power or privilege. All rights and remedies granted in this Agreement will be in addition to other rights and remedies to which the Parties may be entitled at law or in equity.

21.2 *Successor Interests; Assignment.* This Agreement is binding upon the heirs, legal representatives, successors and permitted assigns of American Home Systems and Subscriber. Subscriber shall not assign this Agreement without the prior written consent of American Home Systems which consent shall not be unreasonably withheld. By way of example and not limitation, American Home Systems may reasonably withhold consent for reasons such as creditworthiness of the proposed assignee, or if the assignee is a competitor of American Home Systems. Because this Agreement is made by American Home Systems in reliance on the financial, business and personal reputation of Subscriber and its ownership and management, any change in control of Subscriber shall be deemed an assignment requiring American Home Systems' consent hereunder. If American Home Systems denies consent for any reason, Subscriber shall have the option to terminate this Agreement and pay American Home Systems 26% of the average of the last three months invoices for American Home Systems Programming multiplied by the number of months remaining in the initial or any Renewal Term ("Buyout"). If Subscriber assigns this Agreement in contravention of this Section, American Home Systems may, at its option, continue this Agreement in full force and effect, or immediately terminate the Agreement in which event Subscriber shall pay the Buyout referenced above upon demand.

21.3 *Survival.* The following provisions shall expressly survive the expiration or termination of this Agreement 8, 11, 12, 13, 17, 14, 15, 19, and 23. All other provisions of this Agreement that by their nature contemplate obligations that would reasonably be expected to continue beyond the end of the Term to give effect to the intent of the Parties will survive the expiration or termination of this Agreement.

21.4 *Construction.* Each of the parties acknowledges that this Agreement has been fully negotiated by the Parties with assistance of counsel and, therefore, no provision of this Agreement will be construed or interpreted against any Party because such Party or its legal representatives drafted such provision.

21.5 *Headings.* This Agreement's section headings are for convenience only, are not to be deemed part of its substantive provisions, and are not to be considered in its construction or interpretation.

21.6 *Counterparts.* This Agreement may be executed in multiple counterparts, each of which will be deemed an original. All such counterparts together will constitute one instrument.

SCHEDULE 1
TELEVISION SERVICES
Bulk Programming Services Agreement

1. *Equipment.* The television programming for the entire property will be received by three individual 30" dishes to be installed on the clubhouse roof. The exact location of the 30" dishes to be determined at the time of installation, so as to allow ideal placement for operations. Signal is then distributed and controlled via the headend equipment to be installed inside the clubhouse. Pedestals and Control Housings are installed throughout the property to complete distribution of television service.

2. *Channels.* The following channels shall be distributed as part of the bulk agreement to each unit which maintains a certificate of occupancy: TBS, TNT, USA, FX, E! Entertainment, Lifetime, The Sci-Fi Channel, Comedy Central, CNN, CNN Headline News, C-SPAN, C-SPAN2, ESPN, ESPN2, ESPN News, ESPN Classic, The Weather Channel, Fox News, Fox Sports World, Fox Sports World on Espanol, Gol TV, Bloomberg, Cartoon Network, Nickelodeon, Discovery, Discovery Health Network, Learning Channel, Fox Movie Channel, MTV, VH1, TBN, BYU TV, Home Shopping Network, QVC, ABC, CBS, FOX, KIZZ, NBC-KSL, PAX-KUPX, PBS-KUED, PBS-KBYU, PBS-KUEN, WB-KUWB.

3. *Digital Programming.* Add-on packages are available to all tenants. Any add-on packages are received through the Digital Programming of American Home Systems. The tenant shall be required to pay a one time set-up fee and place a fully refundable deposit per "set top box" or "receiver" in order to receive digital programming. The tenant is to be billed separately for their digital programming subscription. Listed below are digital programming packages currently available.

Initial: American Home Systems JS Subscriber JS

DIGITAL PROGRAMMING SERVICES
March 1, 2004
(Subject to change)
ELIGIBLE DIGITAL PROGRAMMING PACKAGES:

A. BASIC PROGRAMMING:

AMERICA'S TOP 60 - \$34.99 per month per Digital Subscriber

Lifestyle Entertainment

A&E, Comedy Central, Court TV, E! Entertainment Television, Lifetime, Sci-Fi Channel, Spike TV, TNT, TBS, USA Network
News / Information
C-Span, C-Span2, CNBC, CNN, Headline News, NASA, The Weather Channel

Shopping

Home Shopping Network, QVC, Shop NBC, Shop at Home, Beauty & Fashion Channel, Men's Channel, America's Collectibles Network, Healthy Living Channel, ISHCP, Stuff TV, TV Outlet Mall

Family

ABC Family, Cartoon Network, Disney Channel (East & West), Nick at Night (East & West), TV Land, Family Net, EMTN

General Sports

ESPN, ESPN2, ESPN Alternate, ESPN2 Alternate, ESPN News, TV Games Network

Education / Learning

History Channel, The Learning Channel, Discovery Channel, Food Network, Home & Garden Television, The Travel Channel

Music

Country Music Television, MTV, MTV2, VH1

** Public Interest Channels may also be available **

AMERICA'S TOP 120 - \$34.99 per month per Digital Subscriber
INCLUDES AMERICA'S TOP 60, PLUS THE FOLLOWING:

Sports (In market only):

ESPN Classic, The Speed Channel, Sports Alternate 1, Sports Alternate 2, Sports Alternate 3, Sports Alternate 4, Comcast Sports Network, Fox Sports Net Chicago, Fox Sports Net Pittsburgh, Fox Sports Net Rocky Mtn, Fox Sports Net Cincinnati, Fox Sports Net Detroit, Fox Sports Net South, Fox Sports Net Florida, Fox Sports Net Southwest, SunShine Network, Fox Sports Net Midwest, Fox Sports Net West, Fox Sports Net New England, Fox Sports Net West 2, Fox Sports Net New York, Madison Square Garden, Turner South, Empire Sports, Fox Sports Net North, NESN, Fox Sports Net Arizona, Fox Sports Net Northwest, Fox Sports Net Bay Area, Fox Sports Net Ohio

Lifestyle Entertainment

BBC America, BET, Bravo, FX, GaiaVision, Game Show Network, Univision (Este & Oeste), WGN Superstation, We: Women's Entertainment,

Telefutura (Este & Oeste)

Education / Learning

Animal Planet, Discovery Health

Music

Fuse, DISH CD - 32 Music Channels

Movies

American Movie Classics, Independent Film Channel, Lifetime Movie Network, Turner Classic Movies

News / Information

CNN / CNN International, Fox News Channel, MSNBC, Tech TV

Family

Noggin, PAX TV, Toon Disney

Blackout Restrictions apply

AMERICA'S TOP 180 - \$44.99 per month per Digital Subscriber
INCLUDES AMERICA'S TOP 120, PLUS THE FOLLOWING:

Lifestyle Entertainment

Biography, Encore WAM / America's Kidz, Reality TV, Soapnet, Style

News / Information

Bloomberg Television, CNBC World

Family

Decomarang, Hallmark Channel, Nickelodeon Games & Sports

Movies

Encore Mysteries, Encore (West), Encore True Stories, Encore Action / Adventure, Encore Westerns, TMC Xtra West, Encore Love Stories, Fox Movie Channel, The Movie Channel (West)

Sports

The Golf Channel, Fox Sports Net World, Outdoor Life Network, Gol TV

Education / Learning

Discovery Home & Leisure, Discovery Kids, Discovery Times Channel, Discovery Wings, Do It Yourself Network, History Channel International, National Geographic Channel, The Science Channel, Wisdom Television, The Outdoor Channel

Initial: American Home Systems 7/2 Subscriber *W*

Music
Great American Country, VH1 Classic

AMERICA'S "EVERYTHING" PAK - \$77.99 per month per Digital Subscriber
INCLUDES AMERICA'S TOP 180, PLUS THE FOLLOWING:

HBO The Works (8 Channels)
STARZ Encore (8 Channels)
Showtime Unlimited (11 Channels)
MultiMax (5 Channels)

B. DISH LATINO - \$34.99 per month per Digital Subscriber

Entertainment
Galavisión, Mun2, TV Chile, TV Columbia, TV Española Internacional, Telefuturo Este, Telefuturo Oeste, Telemundo Este, Telemundo Oeste, Univisión
Etna, Unimisión Oeste, HTN
Noticieros
CNN en Español, SUR

Película
Cine Latino, De Película, De Película Clásico
Deportes
Fox Sports World, Gol TV
Educativos
Discovery en Español
Músicales
iMTV, Telehit, iMTV Español, Dish CD - 6 Musik Channels
Entretenimiento Familiar
Toon Disney
De Adultos
Playboy en Español

DISH LATINO DOS - \$34.99 per month per Digital Subscriber
INCLUDES AMERICA'S TOP 60, PLUS THE FOLLOWING:

Entertainment
A&E, Bravo, BET, Comedy Central, El Entertainment Television, Lifetime, USA Network, SYTY, Spike TV, W2, TV Azteca, TNT, TBS, WGN
Noticieros
CNN, Headline News, NASA Channel, Link Media
Músicales
MTV2, MTV, 30 Audio Musik Channels
Entretenimiento Familiar
Cartoon Network, Nickelodeon / Nick at Night (East or West), PAX TV
Película
Lifetime Movie Network
Deportes
ESPN, Fox Sports (RSN) - in market, TV Games Network
Educativos
History Channel, The Learning Channel, Discovery Channel, Discovery Channel Kids, Food Network, Home & Garden Television, The Travel Channel,
Animal Planet
Relojeros
Elemental Word Television Network, Angel One, DayStar, Trinity Broadcast Network, Vision TV
Compras
Auction TV, Home Shopping Network, QVC, Shop NBC, Shop at Home, Beauty & Fashion Channel, Woman's Channel, America's Collectibles Network, 1
Shop, Stuff TV, TV Outlet Mall, Catalog TV, Mens Shopping Channel

DISH LATINO MAX - \$44.99 per month per Digital Subscriber
INCLUDES DISH LATINO, AMERICA'S TOP 60 PLUS THE FOLLOWING:

Entertainment
Bravo, WGN, FX
Noticieros
CNBC World, BBC America, Bloomberg
Entretenimiento familiar
PAX TV, Hallmark Channel
Películas
Movie Channel Xtra West, Fox Movie Channel, Lifetime Movie Network

Initial American Home Systems 7/92 Subscriber *WJA*

Deportes
 The Speed Channel
 Educativos
 Discovery Kids, Discovery Health, National Geographic, Wisdom, CIV, Animal Planet
 Musicales
 DISH CD - 30 Audio Music Channels

C. DISH NETWORK VALUE PAKS (per month per Digital Subscriber)

America's Top 60 Package + Locals	\$29.99
DISH Latino Package + Locals	\$29.99
America's Top 120 Package + Locals	\$39.99
DISH Latino Dos Package + Locals	\$39.99
America's Top 180 Package + Locals	\$49.99
DISH Latino Max Package + Locals	\$49.99
America's Everything Package + Locals	\$82.99
America's Top 120 + HBO/Cinemax	\$51.99
America's Top 180 + HBO/Cinemax	\$61.99

D. INTERNATIONAL PROGRAMMING PACKAGES (per month per Digital Subscriber)

Arabic Elite Pack (Arabic)	\$29.99	Kairali TV (Malayalam)	\$14.99
Arabic Enhanced Pack (Arabic)	\$22.99	Surya TV (Malayalam)	\$14.99
Chinese Plus Pack (Chinese)	\$24.99	Kairali TV & Surya TV (Malayalam)	\$24.99
Chinese Super Pack (Chinese)	\$21.99	Polsat 2 International (Polish)	\$14.99
Phoenix TV (Chinese)	\$14.99	TVN-24 (Polish)	\$9.99
BNV-TV (Dutch)	\$9.99	Polsat 2 & Radio Maria (Polish)	\$14.99
MBI - Africa (English)	\$14.99	Polish Package (Polish)	\$19.99
Channel One (Farsi)	\$24.99	Radio Maria (Polish)	\$5.00
Channel One & Tapes 1 (Farsi)	\$24.99	RTPI (Portuguese)	\$4.00
Channel One & Tapes 2 (Farsi)	\$32.99	Record International (Portuguese)	\$14.99
Farsi Super Pack (Farsi)	\$14.99	TV Globo (Portuguese)	\$19.99
Tapes 1 (Farsi)	\$24.99	TV Globo/Record Package (Portuguese)	\$29.99
Tapes 1 & Tapes 2 (Farsi)	\$1.00	Channel One Russia (Russian)	\$14.99
RFI (French)	\$9.99	NTV America (Russian)	\$24.99
TV5 (French)	\$12.99	RTVIRTVI+ (Russian)	\$19.99
ERT Sat (Greek)	\$14.99	B4U (South Asian)	\$19.99
Antenna (Greek)	\$14.99	Zee Cinema (South Asian)	
Mega Cosmos (Greek)	\$26.99	Zee TV, TV Asia, SET - Pick Any 2 (South Asian)	\$24.99
Mega/ERT Package (Greek)	\$36.99	Jumbo Pack 1 (South Asian)	\$44.99
Greek Package (Greek)	\$19.99	Jumbo Pack 2 (South Asian)	\$44.99
The Israeli Network (Hebrew/English)	\$9.99	Mega Pack (South Asian)	\$49.99
RAI (Italian)	\$5.00	Super Pack (South Asian)	\$34.99
Radio Maria (Italian)	\$25.00	Radio Maria (Spanish)	\$5.00
TV Japan (Japanese)	\$25.00	Sun TV (Tamil)	\$14.99
TV Japan Hawaii (Japanese)	\$14.99	Gemini TV (Telugu)	\$14.99
Anirang TV (Korean)	\$29.99	PTV Prime (Urdu)	\$14.99
Korean Basic Pack (Korean)	\$36.99		
Korean Variety Pack (Korean)			

Initial: American Home Systems 74 Subscriber Wm

E. LOCAL NETWORKS:

DIGITAL LOCAL Networks

(May Include NBC, ABC, CBS & FOX - Additional Channels May Be Available)

\$5.99 Per Subscriber Per Month

F. PREMIUM PROGRAMMING PACKAGES:

HBO THE WORKS (8 channels) STARZ/ENCORE (8 channels)

SHOWTIME UNLIMITED (11 channels) MULTIMAX (5 channels)

(Add 2.00 for HBO THE WORKS)

Any 1 Package - \$11.99/month

Any 2 packages - \$20.99/month

Any 3 packages - \$29.99/month

Any 4 packages - \$36.99/month

Showtime Unlimited with Starz super Pak: \$20.99/month

HBO with Showtime: \$22.99/month

HBO with Starz: \$22.99/month

HBO with Cinemax: \$20.99/month

Multi-Sport Package: \$5.99/month

Regional Sports Networks: FOX (Arizona, Bay Area, Chicago, Cincinnati, Detroit, Florida, Midwest, New England, New York, North, Northwest, Ohio, Pittsburgh, Rocky Mountain, South, Southwest, West), Comcast SportsNet, Empire Sports, MSG, NESN, Sunshine Network.

** (Blackout restrictions will apply to a majority of professional sports and approximately 40% of the collegiate sports programming on out-of-market networks)

G. A-LA-CARTE PROGRAMMING:

The Outdoor Channel \$1.99/month

Bloomberg Television \$1.99/month

H. HIGH DEFINITION PROGRAMMING:

\$9.99/month

ESPN HD, HD Net

Discovery HD, HD Net Movies

I. ADULT PROGRAMMING:

Extasy \$27.99/month

Fantasy \$22.99/month

Playboy \$14.99/month

TEN \$22.99/month

Applicable Fees:

In addition to the amounts due for Eligible Digital Programming, Subscriber agrees to pay the fees referenced below as applicable. American Home Systems reserves the right to increase or modify these fees, or add additional fees in the future. A \$4.98 per month DISH Video-on-Demand Fee will be charged to tenant for each DISH Player-DVR model 510 or model 522 receiver activated on tenant Account. A \$4.99 per month Additional Content Programming Access Fee will be charged to Tenant for each receiver (other than the primary receiver) activated on a tenant Account. Fees for Pay Per View programming ordered by a tenant. Smart Card Replacement Fee \$30.00 Change of Service Fee \$5.00 (per transaction) Restart Fee \$25.00 (per tenant) Pay-Per-View Accounted Fee \$1.00

Initial: American Home Systems *SLB* Subscriber *SLB*

SCHEDULE 2
BROADBAND SERVICES
Bulk Programming Services Agreement

Service. American Home Systems programming or Bulk Programming will include the ability for each tenant to have access to 3mbps of download throughput, 256kbps of upload throughput, upon completion of the project. System capacity within the project is 10mbps to each tenant. During the project construction the bandwidth will be scaled or phased in to each tenant. The estimated bandwidth scale is 1.5 mbps during the first phase; 3 mbps during the second phase. During the third phase American Home Systems may opt to increase the bandwidth up to 4.5mbps. Minimum throughput is based upon system utilization throughout the property and will be monitored 24 hours a day. Guarantee of minimum throughput levels are not available due to the constant fluctuation of utilization throughout the system. This system is not designed for the support of high volume or commercial grade servers. The system is designed as a "residential system," meaning that high level of volume that indicates server related activity will be monitored and controlled to preserve the integrity of the system for all of its users.

Additional Services. Additional services, higher bandwidth and additional throughput are available on an individual tenant basis. Separate contracts between American Home Systems and the Tenant will be required in order to provide added services. Pricing for such services will be quoted per tenant based upon need.

Service Level Agreement. Upon project completion, American Home Systems will maintain functional service for no less than 20% of a 120 consecutive day period. In the event that American Home Systems fails to perform as outlined in this agreement, Subscriber may deliver to American Home Systems written notice to correct said failure to perform. American Home Systems shall correct such non performance within 30 days or shall be considered to be in default of this agreement, and Subscriber may; (a) terminate the agreement and secure services from another provider (b) contract with another provider to correct the deficiency and charge these costs back to American Home Systems. Said charges must be normal and customary as evidenced by no less than two written bids.

SCHEDULE 3
BULK AGREEMENT PRICING
Bulk Programming Services Agreement

American Home Systems Programming or Bulk Programming as detailed throughout this contract is provided to the "Subscriber" for the amount of \$42.00 per month per "Tenant" which includes any current taxes. Taxes or fees placed upon the service by federal, state, or local governments or institutions may vary over time and any increases or decreases will be added to or deducted from the monthly charge.

Initial: American Home Systems [Signature] Subscriber: [Signature]

EXHIBIT 4

BULK PROGRAMMING SERVICES AGREEMENT

This Bulk Programming Services Agreement ("Bulk Agreement") is entered into by and between American Home Systems LLC, a Utah limited liability company located at 12227 South Business Park Dr., Sandy, Utah 84020 and the ("Subscriber") identified below. This Bulk Agreement includes the following Attachments, the terms and conditions of which are hereby incorporated by reference in their entirety:

Schedule 1 - Television Service
Schedule 2 - Broadband Service
Schedule 3 - Bulk Agreement Pricing

SUBSCRIBER:

Legal Name of Entity: Cambria Condominiums Inc
Type of Entity: Non-Profit Corporation
State of Formation: UTAH
D/B/A: _____
Address for Notices: P.O. Box 1006
Orem, UT 84059-1006
Facsimile: (801) 235-1545
Telephone: (801) 235-7368
Property Name: Cambria Condominiums
Property Address: _____

NOTE: THIS AGREEMENT MUST BE COMPLETED FOR EACH PROPERTY.

Effective Date: Feb 08 2007 (To be completed upon execution)
(Month) (Day) (Year)

Expiration Date of Initial Term: The expiration of the initial term will be 7 years from the day that a certificate of occupancy is issued to the last building in the project.

In witness whereof, American Home Systems LLC and "Subscriber" have caused their duly authorized representatives to execute this Agreement as of the Effective Date set forth above.

AMERICAN HOME SYSTEMS L.L.C.

By: _____
(authorized signature)

Printed Name: _____

Title: _____

SUBSCRIBER

By: Jason Sutter
(authorized signature)

Printed Name: JASON SUTTER

Title: HOA MGR

Initial: American Home Systems

Subscriber JS

TERMS OF LEASE (continued)

AND THEN ONLY IN WRITING. IF THE EQUIPMENT FAILS TO OPERATE PROPERLY, OR THE VENDOR OR ANY OTHER PERSON FAILS TO PROVIDE ANY MAINTENANCE OR OTHER SERVICE, YOU WILL MAKE ANY COMPLAINT ONLY AGAINST THE VENDOR OR OTHER PERSON AND NOT AGAINST US (EITHER BY WAY OF A CLAIM, COUNTERCLAIM, DEFENSE OR EXCUSE TO PAYMENT).

(c) MARLIN MAKES NO WARRANTIES. THE EQUIPMENT IS LEASED BY US TO YOU "AS IS," "WHERE IS" AND WITH ANY AND ALL FAULTS. WE HAVE MADE NO STATEMENT, REPRESENTATION, OR WARRANTY REGARDING THE EQUIPMENT. WE DISCLAIM ALL EXPRESS AND IMPLIED WARRANTIES, INCLUDING WITHOUT LIMITATION ANY IMPLIED WARRANTY OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE. WE SHALL TRANSFER TO YOU ALL EXPRESS WARRANTIES, IF ANY, MADE BY THE EQUIPMENT VENDOR TO US, BUT THIS DOES NOT IMPLY THAT THERE ARE ANY SUCH WARRANTIES. YOU MAY CONTACT THE VENDOR TO GET A STATEMENT OF SUCH WARRANTIES, IF ANY.

(d) BARGAINED FOR WAIVER OF RIGHTS. YOU WAIVE ANY AND ALL RIGHTS AND REMEDIES YOU HAVE UNDER ARTICLE 2A OF THE UNIFORM COMMERCIAL CODE, INCLUDING SECTIONS 508 THROUGH 522 THEREOF.

(e) DISCLAIMER OF LIABILITY. WE ARE NOT LIABLE FOR ANY LOSS, DAMAGE (INCLUDING LOST PROFITS, SPECIAL DAMAGES OR INCIDENTAL OR CONSEQUENTIAL DAMAGES) OR INJURY TO YOU, YOUR EMPLOYEES OR ANY OTHER PERSON OR PROPERTY CAUSED BY THE EQUIPMENT.

5. RENTAL AMOUNT; INTERIM RENT; LATE FEE; DOCUMENTATION FEE. The monthly or other periodic rent you have agreed to pay is stated above. The rental amount is based on the estimated cost of all the Equipment and it may be adjusted higher or lower if the actual cost of the Equipment is higher or lower than the estimate. You also agree to pay a partial rental payment (interim rent) covering the period between the delivery date and the date the first regular payment is due. If we do not receive your payment by its due date, there will be a late fee equal to the greater of \$20.00 or 15% of the late amount (or, if less, the maximum amount allowable under applicable law), which you agree is a reasonable estimate of the costs we incur with respect to late payments and is not a penalty. Upon your request, we will waive the first assessed late charge. We may charge you a one-time documentation fee up to \$250.

6. LEASE COMMENCEMENT AND TERM. This Lease will commence when the Equipment is delivered to you and will continue for the entire Lease term plus any interim rent period and any renewal term. The monthly (or other periodic) due date will be established by us. The due date for the first regular rental payment will also be established by us; however, it will not be greater than 30 days from the date on which the Equipment was delivered to you.

7. ADVANCE PAYMENT(S) AND/OR SECURITY DEPOSIT. You have paid us one or more advance payments and/or a security deposit in the amount(s) indicated above. If the Lease does not commence for reasons other than our own negligence, we may retain such monies to compensate us for our credit and other administrative costs. You agree the security deposit will not bear interest and that we may apply it to any amount owed to us, and should we do so, you agree to restore the security deposit to its original amount. You may request the return of the security deposit only after all of your obligations under the Lease have been met in full.

8. EQUIPMENT DELIVERY. You understand and agree that we are not responsible for packaging, delivery, installation or testing of the Equipment. You (and/or the Vendor, if you have made such arrangements with the Vendor) are responsible for all such matters. You agree that you will not have any complaint against us if the Vendor or any other person improperly packages the Equipment or delays in delivering or installing it.

9. USE OF THE EQUIPMENT. YOU REPRESENT TO US THAT THE EQUIPMENT WILL BE USED ONLY FOR COMMERCIAL, BUSINESS OR AGRICULTURAL PURPOSES, AND NOT FOR PERSONAL, FAMILY OR HOUSEHOLD PURPOSES. In addition, you agree not to attach the Equipment to any realty or otherwise permit it to become a "fixture" to real estate or a structure thereon, nor will you trade it in, make alterations to it, sell or dispose of it without our prior written permission. You shall not allow any liens or encumbrances (for example, a mechanic's lien) to be placed on the Equipment. You will keep and use the Equipment only at the address listed above and will not move it or return it prior to the end of the Lease term.

10. MAINTENANCE AND SERVICE. You agree that we are not responsible for maintenance, repairs or service to the Equipment. You agree to use the Equipment strictly in the manner for which it is intended by the manufacturer, and you shall maintain the Equipment in good operating order. At the end of the term of the Lease, unless you have been given a written option to purchase the Equipment and you make the purchase, you will be liable for all damage or distress to the Equipment.

11. LEASE ASSIGNMENT; SUBLEASE OF EQUIPMENT. THIS LEASE WAS MADE TO YOU BASED ON YOUR OWN CREDIT. THEREFORE YOU AGREE THAT YOU MAY NOT ASSIGN, TRANSFER OR SELL ANY OF YOUR RIGHTS OR INTERESTS UNDER THE LEASE TO ANY OTHER PERSON OR ENTITY, NOR MAY YOU SUBLEASE OR RENT ANY OF THE EQUIPMENT TO ANY OTHER PERSON OR ENTITY. HOWEVER, YOU AGREE THAT WE MAY ASSIGN, TRANSFER, SELL, PLEDGE OR OTHERWISE ENCUMBER ANY OR ALL OF OUR RIGHTS AND INTERESTS UNDER THIS LEASE (INCLUDING OUR RIGHTS AND INTERESTS IN THE EQUIPMENT) TO ANY OTHER PERSON OR ENTITY (INCLUDING A BANK OR OTHER SECURED PARTY OR A BUYER) (COLLECTIVELY, A "THIRD PARTY") WITHOUT PRIOR NOTICE TO YOU. SUCH THIRD PARTY MAY ALSO ASSIGN, TRANSFER, SELL, PLEDGE OR OTHERWISE ENCUMBER ITS RIGHTS AND INTERESTS. IN THIS EVENT, YOU AGREE THAT SUCH THIRD PARTY, OR ITS ASSIGNEE OR TRANSFEREE, WILL RECEIVE ALL THE RIGHTS AND INTERESTS WE HAD UNDER THE LEASE BUT NONE OF OUR OBLIGATIONS OR LIABILITIES, IF ANY. WE WILL CONTINUE TO BE RESPONSIBLE FOR ALL SUCH LIABILITIES AND WILL RETAIN AND HONOR ALL SUCH OBLIGATIONS, IF ANY. YOU PROMISE AND AGREE THAT YOU WILL NOT ASSERT ANY CLAIMS, COUNTERCLAIMS, DEFENSES OR SETOFFS AGAINST SUCH THIRD PARTY. YOU HEREBY ACKNOWLEDGE THAT ANY TRANSFER OF OUR RIGHTS AND/OR INTERESTS TO A THIRD PARTY WOULD NOT MATERIALLY CHANGE YOUR OBLIGATIONS UNDER THE LEASE OR INCREASE YOUR RISKS.

12. DAMAGE TO EQUIPMENT; RISK OF LOSS OF EQUIPMENT; INSURANCE. You agree that we are not liable or responsible for any damage to the Equipment, or any loss of or casualty to the Equipment from any cause whatsoever. NO SUCH DAMAGE, CASUALTY OR LOSS WILL AFFECT YOUR RESPONSIBILITIES AND OBLIGATIONS UNDER THE LEASE. You must maintain acceptable public liability insurance naming us as "additional insured". You must keep the Equipment insured against all risks of loss in an amount equal to the replacement cost and have us listed on the policy as "loss payee." If you do not give us proof of the property insurance within 30 days after the Lease commences, then depending on the original cost of the Equipment we may either (i) obtain property insurance to cover our interests and charge you a fee for such coverage (including a monthly administration fee and a profit to us) or (ii) charge you a monthly non-compliance fee up to \$50 (which provides no insurance benefit). You can cancel the insurance coverage fee or non-compliance fee at any time by delivering the required proof of insurance.

AS A CONVENIENCE TO YOU (THE LEASING CUSTOMER) AND TO FURTHER EXPEDITE THIS TRANSACTION FOR YOU, WE (MARLIN) AND YOU HAVE AGREED THAT A PHOTOCOPY OR FACSIMILE OF THIS LEASE WHICH INCLUDES A PHOTOCOPY OR A FACSIMILE OF THE SIGNATURES OF BOTH PARTIES SHALL BE AS VALID, AUTHENTIC AND LEGALLY BINDING AS THE ORIGINAL VERSION FOR ALL PURPOSES AND SHALL BE ADMISSIBLE IN COURT AS FINAL AND CONCLUSIVE EVIDENCE OF THIS TRANSACTION AND OF THE EXECUTION OF THE DOCUMENT.

13. TAXES AND CERTAIN FEES RELATING TO THE LEASE OF THE EQUIPMENT. You agree and understand that the amounts we are charging you to rent the Equipment do NOT cover taxes, governmental fees and similar types of costs. Accordingly, you agree to pay us upon demand for all taxes (including but not limited to sales, property, use and other taxes), administrative costs and other charges and fees relating to this Lease or to the use or ownership of the Equipment. We may adjust this Lease and the monthly (or other periodic) payment amount to finance for you any taxes due at Lease inception. We may bill you based on our estimate of the taxes. We may charge you an annual property tax administration fee up to \$15. If we gave you a \$1.00 purchase option, we may require you to file all personal property tax returns.

14. TITLE TO THE EQUIPMENT. You agree that the Equipment is and will remain throughout the term of the Lease solely our property. We will have title to the Equipment throughout the term, and this is a "true lease." You hereby grant us a first priority security interest in the Equipment and you authorize us and our agents to file Uniform Commercial Code Financing Statements recording such security interest (in case this is later determined not to be a "true lease").

15. YOUR REPRESENTATIONS TO US. The person signing this Lease on behalf of the leasing customer hereby represents and warrants to the leasing company that: This Lease has been authorized by any and all action required of the corporation, partnership, limited liability company or other form of business (whichever applies in your case), and no consent of any other person or entity is necessary; the lessee entity has complete power to enter into this Lease, and the person signing on behalf of the lessee has been authorized to do so; the Lease is a legal, valid and binding obligation of the lessee entity, and enforceable against the lessee in accordance with its terms; all factual statements made in this Lease and all other information supplied to us by the lessee entity or your representatives, is accurate and complete in all material respects.

16. DEFAULT DEFINED. You will be in default under this Lease if any of the following events occur: (a) you fail to make any rental payment or pay any other amount due under this Lease by its due date; (b) you fail to comply with any other term or condition of this Lease or any other agreement between us, or fail to perform any obligation imposed upon you relating to this Lease or any such other agreement; or (c) you become deceased (if the lessee entity under this Lease is one or more natural persons), go out of business, admit your inability to pay your debts as they fall due, become insolvent, make an assignment for the benefit of your creditors, file (or have filed against you) a petition in bankruptcy, a trustee or receiver of your business assets is appointed, or you sell all or substantially all of such assets.

17. OUR REMEDIES UPON DEFAULT. In the event you default under this Lease, as defined above, we will have the right to take ANY OR ALL of the following actions, in addition to any and all other remedies that may be available to us under law:

(a) terminate the Lease without prior notice or warning to you.

(b) directly debit (charge) your bank account(s) and/or file a lawsuit against you to collect all past due rent AND ALL RENT THAT WILL BECOME DUE IN THE FUTURE DURING THE UNEXPIRED TERM, plus the "residual value" of the Equipment as determined by us in our sole but reasonable judgment, plus all other fees, charges or amounts that are then due. You agree to pay all of our reasonable legal costs, including but not limited to reasonable attorney's fees, and reasonable overhead for employee time spent on preparing for suit or attempting to collect payments.

(c) repossess the Equipment or apply to a court for an order allowing repossession. In this event, you agree that, after the Equipment is repossessed, you will have no further rights in the Equipment, and you agree we may resell, re-lease or otherwise remarket the Equipment without notice to you. You agree (and you waive any rights that may provide to the contrary) that we will NOT be required to repossess, resell, re-lease or otherwise remarket the Equipment at any time, and that our failure to do so will not affect our other rights of collection and other rights under this Lease or under law.

18. PERSONAL JURISDICTION OVER YOU IN PENNSYLVANIA, AND PLACE FOR ANY LAWSUIT. You hereby acknowledge that this Lease was accepted by you in Pennsylvania, where we maintain an office, and it did not take effect until we received the executed legal documents in our Pennsylvania office. Accordingly, YOU AGREE THAT THIS LEASE SHALL BE GOVERNED BY THE LAWS OF THE COMMONWEALTH OF PENNSYLVANIA. YOU AGREE THAT ANY SUIT RELATING TO THIS LEASE SHALL BE BROUGHT ONLY IN A STATE OR FEDERAL COURT IN PENNSYLVANIA, AND YOU IRREVOCABLY CONSENT AND SUBMIT TO THE JURISDICTION OF SUCH COURTS. EACH PARTY WAIVES ANY RIGHT TO A JURY TRIAL. Any action by you against us must be commenced within one year after the cause of action arises or be forever barred.

19. TAX BENEFITS BELONG TO LEASING COMPANY. The following applies to this Lease UNLESS, at the commencement of this Lease, you execute and deliver to you a document signed by an executive officer of Marlin giving you the option at the end of the Lease term to purchase the Equipment for one dollar (\$1.00). For all state, federal and local tax purposes, we (or our successors and assigns) are the sole owner of the Equipment and we are entitled to all tax benefits relating to the Equipment, including but not limited to tax credits, depreciation and deductions. You agree not to do anything that is inconsistent with our ownership of the Equipment. You agree not to claim to be the owner of the Equipment on any tax returns or in any other document or for any other purpose. IF YOU DO ANYTHING OR FILE ANYTHING THAT CAUSES US TO LOSE ANY SUCH TAX BENEFIT CONTEMPLATED ABOVE, OR IF WE SUFFER ANY HARM, DAMAGE, COST, LOSS, LIABILITY (FOR EXAMPLE, IF INTEREST OR TAX PENALTIES ARE IMPOSED AGAINST US), OR IF ANY SUIT OR PROCEEDING IS BROUGHT AGAINST US, ARISING OUT OF YOUR BREACH OF ANY OF THE AGREEMENTS YOU HAVE MADE IN THIS SECTION, YOU AGREE TO HOLD US HARMLESS, DEFEND US AND INDEMNIFY (REIMBURSE OR PAY) US WITH RESPECT TO THE AMOUNT OF SUCH LOST BENEFITS OR OTHER DAMAGE, LOSS, COST (INCLUDING REASONABLE ATTORNEY'S FEES) OR LIABILITY. THIS DUTY TO INDEMNIFY US SHALL SURVIVE THE TERMINATION OF THIS LEASE.

20. OTHER INDEMNIFICATION. You understand that we have no control over your use of the Equipment and, in any event, for the amount of rent we are charging we cannot agree to accept any financial, liability or other risks relating to the use or ownership of the Equipment. Accordingly, you agree to hold us harmless, indemnify (pay or reimburse) and defend us against all claims, liabilities, losses, suits, proceedings, damages, costs (including reasonable legal fees) relating to this Lease or to the use or ownership of the Equipment, including but not limited to claims for death or injury to persons and claims for property damage. This duty to indemnify shall survive the termination of this Lease.

21. RETURN OF THE EQUIPMENT; RENEWAL. Unless we have given you a written option to buy the Equipment at the end of the Lease term for \$1.00, you must notify us by certified mail between 90 and 180 days prior to the end of the Lease term if you intend on returning the Equipment. If you do not notify us, the Lease will automatically extend for 12 months under the same terms and conditions. If you give us the proper notice, then at the end of the Lease term you shall return the Equipment in good working order in a manner and to a location designated by us. You agree to reimburse us for our costs to refurbish returned Equipment.

1. Definitions.

"Affiliate" means a company, person or entity directly or indirectly controlling, controlled by, or under common control with another company, person or entity.

"Bulk Programming" or "American Home Systems Programming" means any video, audio, data, internet, or broadband programming service delivered to the Property.

"Multiple Dwelling Unit" means a building located in the Territory subdivided into two or more individual single family residential dwelling units, which consists solely of apartment complexes, condominiums, townhomes, or residential dormitories.

"Property" means the Multiple Dwelling Unit(s) or Guest Property referenced on the first page of this Agreement which is receiving American Home Systems Programming pursuant to this Agreement.

"Property Agreement" means the right of entry or other similar type agreement which allows American Home Systems access to the Property and the ability to distribute video and audio programming services to residents of the Property.

"Subscriber" means, for purposes of this Agreement only, the managing authority, business entity, or association that controls, represents, and manages the Property and Tenants that dwell therein.

"Tenant" means, for purposes of this Agreement only, each of the following: (i) for a Multiple Dwelling Unit system, each individual dwelling unit at the Property, (ii) for a Guest Property, each television and other viewing unit in each Guest Property. In any event, the term Tenant will not include any connection not authorized pursuant to this Agreement. Each Tenant shall be considered a "Drop".

"System" means a coaxial, fiber optic or hybrid fiber optic, SMATV, MMDS, 5-900MHz or 18 GHz multi-channel audio, video, data, internet, broadband services distribution system owned and managed by American Home Systems, which serves the Property.

"Total Number of Households Passed" shall be determined by the cumulative count of all dwelling units at the Property which are occupied or qualify for a Certificate of Occupancy as provided by a governing authority or building inspector which must be provided to American Home Systems upon request. Each "Household Passed" shall be considered a "Drop".

2. Term. The initial term of this Agreement begins on the Effective Date and terminates on the Expiration Date set, each as set forth on the first page of this Agreement ("Initial Term"). After the Initial Term set forth on the first page, this Agreement will renew automatically for successive one (1) year terms ("Renewal Term") unless either Party gives written notice of non-renewal to the other at least ninety (90) days before the end of the Initial Term or any Renewal Term. The "Term" of this Agreement is the Initial Term plus any number of Renewal Terms.

3. American Home Systems Responsibilities.

3.1 Programming. American Home Systems will provide the Bulk Programming and headend receiving equipment, to be installed at the Property, for distribution to Tenants at the Property. Once a programming package is approved by Subscriber, American Home Systems shall provide such package to all units at the Property regardless of occupancy status. The same basic programming package will be offered to all tenants. Subscriber acknowledges that the owners/distributors of Bulk Programming, rather than American Home Systems, determine the content of the Bulk Programming, and as a result American Home Systems shall have no responsibility or liability for Bulk Programming content. As between American Home Systems and Subscriber, or American Home Systems and any Tenant, American Home Systems has the sole right to edit, select, schedule and determine the American Home Systems Programming services contained in the American Home Systems Programming packages, and to determine and change fees charged to Subscriber for such American Home Systems Programming. If and when such changes are made, American Home Systems shall not degrade the quality or mix of programming and shall replace deleted channels with others of similar quality. Any rate increases shall not exceed six percent per year without written consent of the subscriber. American Home Systems may add, delete, or modify the Bulk Programming from time to time in its sole discretion and will notify Subscriber of the addition or deletion of available Bulk Programming, which may be caused, among other things, by satellite programming industry changes, deletions, additions, or the termination, modification or replacement of American Home Systems programming agreements. Any changes to the Bulk Programming shall be effective upon notification by American Home Systems.

3.2 Satellite and Broadband Delivery.

3.2.1 American Home Systems may distribute Bulk Programming signals via satellites owned, leased, operated or otherwise accessed by EchoStar or Affiliates of EchoStar as currently constituted or from such satellites and at such orbital locations as may be added to the EchoStar fleet at any time and from time to time as determined by EchoStar in its sole discretion.

3.2.2 American Home Systems has the right, without liability, to interrupt transmission of Bulk Programming (A) whenever required under the terms of an applicable programming or other agreement (for example, when required for blackouts of sports events), and (B) when reasonably necessary, as determined by American Home Systems, for testing or maintenance, so long as American Home Systems uses commercially reasonable efforts to minimize disruption of the Systems' delivery of Bulk Programming to Subscribers (for example, by conducting the interruptions during overnight hours or periods of low usage).

3.3 Authorizations. American Home Systems will authorize receipt of Bulk Programming in accordance with American Home Systems' standard procedures, but it will be Subscriber's responsibility to instruct American Home Systems when a unit is to be authorized or de-authorized for a System.

3.4 Compliance with Subscriber Requests. American Home Systems will have no liability to Subscriber, or any tenant, or any third party arising out of American Home Systems' fulfillment of any request or response to any instructions which has been reasonably given, whether or not

Initial: American Home Systems _____ Subscriber: JS

such request or instructions were given in writing (including, without limitation, instructions relating to authorization or de-authorization of Bulk Programming).

3.5 Responsibility for Systems and Costs. American Home Systems will purchase, install, repair, maintain and operate the System at the Property, including without limitation headend equipment, for receipt, decoding and distribution of Bulk Programming to Subscriber which may include, but are not limited to, IRDs, de-scrambling equipment, multi-switches, racks, combiners, splitters, and amplifiers. Unless specifically provided in this Agreement or agreed upon in a separate written agreement between the parties, American Home Systems agrees to keep the System and all related equipment in good working order and repair, and will be responsible to ensure that scrambling/descrambling equipment, firewalls and encryption technology is utilized within its System to prevent piracy of any Bulk Programming, or unauthorized usage of data circuits.

3.6 Customer Service. Unless otherwise agreed upon in a separate writing between the Parties, American Home Systems will be responsible for the purchase and installation of all equipment related to its Systems and day-to-day service contact with Subscriber and Tenants. American Home Systems will: (i) maintain an incoming service telephone line that accepts trouble reports and billing and other inquiries from Subscriber and Tenants, 24 hours a day, 365 (or 366) days a year; (ii) respond to each Subscriber or Tenants trouble call, inquiry, and installation or service request within a 24 hour period; (iii) install and maintain the system in a commercially reasonable manner and to industry standards; (iv) have available maintenance and service parts specified for the system.

3.7 Broadband, internet, and data services will be re-evaluated every two years to ensure that services being offered by American Home Systems are comparable in price and quality to services being offered to the majority of the general public.

4. Subscriber Responsibilities.

4.1 Payments. Subscriber is responsible for invoicing and collecting payments from individual units for receipt of Bulk Programming.

4.2 Authorizations. Subscriber shall immediately notify American Home Systems in writing if Subscriber receives notice that may affect American Home Systems ability to provide American Home Systems Programming to the Property.

4.3 Exclusivity. Subscriber agrees that the American Home Systems Programming will be the sole and exclusive multi-channel video, audio, data, internet, and broadband programming services to Subscriber and Tenants at the Property, without regard to the means of delivery of such programming service, except that Property may offer: 1) local off-air television signals via off-air antenna or via another transport technology only, and 2) other programming that is not offered or available from American Home Systems, provided, however, if such programming becomes available from American Home Systems, Subscriber agrees to use its best efforts to purchase such programming from American Home Systems. Subscriber agrees to purchase such programming from American Home Systems once any existing agreement for such programming has either terminated or expired and Subscriber further agrees to not renew any existing agreement for such programming. Subscriber agrees that it will not receive any of the programming channels which comprise any of the Bulk Programming packages from any third party, including without limitation, cable distribution, C-band or DBS. Notwithstanding, the Subscriber or Tenant may purchase internet data or broadband service as an addition to service provided by American Home Systems.

4.4 Redistribution Prohibited. Subscriber agrees that it will take reasonable precautions to prevent and not knowingly allow other person(s) or entities, directly or indirectly to, (i) reproduce, resell, retransmit, rebroadcast or otherwise redistribute in any manner or form any Bulk Programming, or (ii) make any modification, addition or deletion to any of the Bulk Programming. If Subscriber becomes aware that any unauthorized party is receiving, transmitting or exhibiting any part of the Bulk Programming, Subscriber will notify American Home Systems in writing of the name and address of such party. Further, if any such activities are in any way related to Subscriber or its operations, including but not limited to any rights or obligations under this Agreement, then Subscriber will immediately notify American Home Systems of such activity and cooperate with American Home Systems in preventing any continuance of such activities. This subsection does not apply to the recording, after receipt by a Subscriber, of Bulk Programming by private individuals for in-home viewing only.

4.5 Exhibition.

4.5.1 Subscriber will ensure that premium, or pay-per-view programming is not exhibited in any common areas at the Property such as reception areas, waiting areas, fitness rooms, or such other areas.

4.5.2 Subscriber will not permit the exhibition of any Bulk Programming at a public place where a cover charge or other admission fee is charged to individuals to view the Bulk Programming, unless specifically authorized in writing by American Home Systems.

4.6 Obligations to Programmers. Upon notice thereof, Subscriber will comply with all requirements established by Programmers and communicated to Subscriber, including but not limited to blackout requirements and commercial exhibition restrictions. American Home Systems may blackout or otherwise modify programs to comply with programmers agreements or governmental requirements.

4.7 Signal Theft/Unauthorized Access. Subscriber shall not directly or indirectly: (i) engage in any signal theft, piracy, unauthorized browsing or similar activities; (ii) engage in any unauthorized reception, transmission, publication, use, display or similar activities with respect to Bulk Programming; (iii) alter any American Home Systems equipment or "Smart Cards", or any other equipment compatible with programming delivered by American Home Systems or any of its Affiliates to be capable of signal theft (or for any other reason without the express written consent of American Home Systems); (iv) manufacture, import, offer to the public, sell provide or otherwise traffic in any technology, product, service, or device which is primarily designed or produced for the purpose of, or is marketed for use in, or has a limited commercially significant purpose other than, assisting in or facilitating signal theft, unauthorized browsing or other piracy; or (v) aid any others in engaging in, or attempting to engage in, any of the above prescribed activities. Operator shall immediately notify American Home Systems if it becomes aware of any such activity by any person or entity and agrees to cooperate with American Home Systems in the prosecution of any such activities including providing any documentation requested by American Home Systems related to such activities.

5. Equipment.

5.1 The subscriber will execute a lease agreement (schedule 4) with American Home Systems or it's designees for the head end equipment. The monthly lease payment is a part of, and will be taken automatically out of, the bulk programming payment. It is not an addition thereto.

5.2 Ownership of Equipment. American Home Systems maintains sole ownership of the System at the Property, unless specifically agreed upon in a separate written agreement between the parties, including without limitation, headend equipment for receipt, decoding and distribution of Bulk Programming to Subscribers which may include, but are not limited to, IRDs, de-scrambling equipment, multi-switches, racks, combiners,

Initial: American Home Systems _____ Subscriber JS

splitters, amplifiers, conduits, cabling, and wiring infrastructure. American Home Systems agrees to keep the System and all related equipment in good working order and repair, and will be responsible to ensure that scrambling/descrambling equipment, firewalls, and encryption technology is utilized within its System to prevent piracy of any Bulk Programming. At the completion of the initial term of service, Why'rd will make no further exclusive claim of ownership to the underground conduit, cables, and wiring.

6. Reports.

6.1 Other Reporting. Subscriber will comply promptly with other reasonable reporting requirements adopted from time to time by American Home Systems to facilitate compliance with legal requirement or with Programming Agreements.

7. Fees, Invoices, and Payments.

7.1 Programming Service Rates. Subscriber agrees to pay monthly to American Home Systems the rates per Unit (per Drop) per month for the Bulk Programming package selected multiplied by the number of units which maintain a certificate of occupancy, and other applicable charges for Bulk Programming distributed to Subscriber and Tenants at the Property. For purposes of this Agreement, the total number of Tenants and the Total Number of Households Passed, shall be the same for purposes of calculating amounts due to American Home Systems. American Home Systems may change or modify the programming selection, Programming Service Rates, and other charges at any time and from time to time in American Home Systems' sole discretion upon notice to Subscriber. Any such changes shall not significantly reduce the overall number, quality or mix of programming being offered. No increase in service rates shall exceed six percent per year without the written consent of the subscriber. Any changes to programming, Programming Service Rates, or other charges shall be effective upon notification by American Home Systems.

7.2 Invoices. American Home Systems will invoice Subscriber monthly in advance for the Programming Service Rates and other charges payable with respect to Bulk Programming distributed to Units at the Property. The first invoice will be for two calendar months and each subsequent invoice will be for one month. The Subscriber is expected to activate programming at the Property between the 22nd and 31st of the month. Any activation occurring from the 1st of the calendar month through the 21st of the calendar month will incur charges for the entire calendar month in which they activate with no prorations.

7.3 Payments. American Home Systems shall invoice Subscriber for American Home Systems Programming charges and Subscriber shall pay to American Home Systems the full amount of each such invoice (irrespective of Subscriber's ability to collect any amounts from Tenants), within 20 (twenty) days of invoice date. Any late payment shall (i) be subject to disconnect (ii) accrue interest at the rate of 1.5% per month until paid in full, and Subscriber agrees to pay all interest charges due and payable by Subscriber hereunder. Subscriber agrees that it is solely responsible for: (i) payment of the invoice according to the payment terms set forth in this Agreement; (ii) collection of all amounts from Tenant Accounts; (iii) all billing of Tenant Accounts; and (iv) handling all billing disputes with Tenant accounts. Any account that is hard disconnected will be subject to a restart fee required for resumption of services. Subscriber will pay all Programming Service Rates and other charges due whether or not Subscriber collects such Programming Service Rates and other charges from Tenants. American Home Systems' failure to submit an invoice does not relieve Subscriber of its obligation to pay all amounts owed on a timely basis, unless otherwise agreed in writing. Subscriber may not offset any payments to American Home Systems against payments otherwise due from American Home Systems.

7.4 Credit: Ability to Pay. Subscriber authorizes and will cooperate with American Home Systems to obtain a credit report regarding Subscriber at any time. Subscriber releases from all liability all persons, companies and credit reporting agencies supplying credit information. Unless American Home Systems has approved Subscriber for credit terms, Subscriber may be required to deliver to American Home Systems, prior to the initial delivery of Bulk Programming to a Property, a security deposit in an agreed upon amount. Any such security deposit will be held, without accrual of interest, as security for the payment in full of all amounts due hereunder and will not be applied to current invoices. If any security deposit is applied to amounts due hereunder, then Subscriber will be required to reinstate such deposit in order to continue delivery of Bulk Programming.

7.5 Taxes. Subscriber will pay all taxes or other governmental fees, including, but not limited to, payment of all federal, state, local, and user taxes, franchise fees and other charges, if any, which are now or may in the future be assessed. Tax certificates must be filed at American Home Systems for any equipment and/or programming exemptions.

7.6 Finality of Billing. Thirty (30) days after any amounts are due under this Agreement, all charges and computations by American Home Systems relating to those amounts will be deemed final and uncontestable by Subscriber, unless earlier disputed by Subscriber in writing to American Home Systems and diligently pursued to resolution. American Home Systems' acceptance of a payment will not be an accord that the amount paid is in fact the correct amount, and acceptance of a payment will not release any claim by American Home Systems for additional amounts due.

7.7 Nonpayment and Non-Compliance Consequences. In addition to any other rights and remedies available at law or in equity, American Home Systems will have the following cumulative rights:

7.7.1 If Subscriber fails to pay or report to American Home Systems any amounts owed under this Agreement when due or otherwise fails to comply with any provision of this Agreement with regard to a particular Property, American Home Systems may: (a) immediately de-authorize all or any portion of Subscriber's Bulk Programming for that Property; (b) give notice of material breach of this Agreement; or (c) both. If some or all of the Bulk Programming is de-authorized for this reason, and is later reauthorized by mutual Agreement of American Home Systems and Subscriber, Subscriber will pay a reauthorization fee sufficient to pay American Home Systems its standard service fees to de-authorize, and service fees to reauthorize said programming including the costs that may be charged by third parties that are a direct or indirect expense to American Home Systems, or that result in an income loss to American Home Systems as a result of subscribers' non-performance as herein set forth.

7.7.2 If American Home Systems refers the collection of any past due amounts to an agency or attorney, Subscriber will pay all collection expenses, including attorneys' fees, upon American Home Systems' request.

8. Compliance With Legal Requirements. Subscriber covenants and agrees that it will comply with any and all local, state or federal laws, rules, regulations, licensing requirements, or valid orders of an administrative agency or court of competent jurisdiction in connection with the performance of its obligations under this Agreement or otherwise ("Legal Requirements"). Subscriber further covenants and agrees that it will obtain and maintain

Initial: American Home Systems _____ Subscriber JS

all permits, licenses, permissions, and rights which may be required under any applicable legal requirements or otherwise for the performance of its obligations pursuant to this Agreement.

9. Representations and Warranties. Subscriber represents and warrants that its execution of this Agreement and the performance of its obligations under this Agreement has been properly authorized by all necessary corporate, partnership or other action, and does not and will not violate any legal requirements applicable to it or result in a breach of or default under any other agreement binding upon it. Subscriber further represents that (i) it is a valid and existing entity in compliance with all laws and regulations related to maintenance of its corporate or other business status; (ii) it is not currently insolvent; (iii) it is not knowingly violating any federal, state or local law or regulation.

10. Notices. All notices and communications given hereunder will be in writing, will be properly addressed and will be deemed given only as follows or in such other manner as may be mutually agreed upon by the Parties in writing: (i) if personally delivered, upon receipt or refusal of delivery, or (ii) if mailed by certified mail, return receipt requested, or registered mail, upon receipt or refusal of delivery, or (iii) if sent by facsimile, upon independent electronic acknowledgement of receipt, or (iv) if sent by reputable overnight delivery service, on the next business day following delivery to such service. Until notice to the contrary is given in accordance with this Section, the Parties' notice information is as listed on the first page of this Agreement.

11. Breach; Termination, and Bankruptcy. If subscriber fails to pay any amount herein provided within thirty (30) days after the same is due and payable, or if subscriber fails to perform any other provision hereof within thirty (30) days after the same is due and payable, or if subscriber fails to perform any other provision hereof within thirty (30) days after American Home Systems shall have requested in writing performance thereof, or if any proceeding requested in writing performance thereof, or if and proceedings in bankruptcy, receivership or insolvency shall be commenced by or against subscriber or his property, or if subscriber makes any assignment for the benefit of creditors, American Home Systems shall have the right but shall not be obligated to exercise any one or more of the following remedies: (a) recover existing amounts due from the subscriber and continue to provide bulk programming and internet services herein specified, in which case American Home Systems shall be entitled to recover, in addition, the monthly amounts due under the contract for said bulk programming and internet services; or (b) discontinue providing bulk programming and internet services and recover from the subscriber all sums that American Home Systems may be entitled to under law. In addition, in the event that subscriber shall be delinquent in the payment of the periodic bulk programming and internet service charge, subscriber agrees to pay to American Home Systems a late charge in the maximum amount permitted by Utah state law from the date of the delinquency.

12. American Home Systems is not an insurer. It is understood and agreed that American Home Systems is not an insurer; that insurance, if any, shall be obtained by the Subscriber or Tenant and that payments provided for herein are based solely on the value of the bulk programming and internet services as set forth herein and are unrelated to any value that the Subscriber, tenants, or any other third party may derive from said services. The Subscriber acknowledges and agrees that because of the uncertain value, if any, that the Subscriber or any third party may derive from service herein offered, it would be impractical and extremely difficult to fix the actual damages, if any, which may proximately result from negligence, or failure to perform any of the obligations herein resulting in loss to the subscriber or any third party. American Home Systems liability, if found liable by a court of law, shall be limited to the sum of two hundred and forty dollars (\$240.00) as liquidated damages and not as a penalty, and this liability shall be exclusive. If Subscriber or Tenant wishes American Home systems to assume a limited liability in lieu of the liquidated damages as herein above set forth, Subscriber or Tenant may obtain from American Home Systems a higher limitation of liability by paying an additional charge to American Home Systems. If Subscriber or Tenant elects to exercise this option, a rider shall be attached to this agreement setting forth the terms, conditions, and amount of the limited liability and the additional charge. Such rider and additional obligation shall in no way be interpreted to hold American Home Systems as insurer.

13. Confidentiality; Press Releases. Subscriber will not disclose (whether orally or in writing, by press release or otherwise) to any third party any information with respect to the provisions of this Agreement, any information contained in any data or report required or delivered hereunder, or any materials related thereto, except: (a) to its officers, directors, employees, auditors and attorneys who have a need to know such information (collectively), in their capacity as such, but such necessary personnel must agree to abide by the provisions of this Section and Subscriber will be responsible for any breach of the provisions of this Section by such necessary personnel; (b) to the extent necessary to comply with Legal Requirements; (c) to comply with its obligations under this Agreement; or (d) as agreed by American Home Systems in writing. This Section will survive, indefinitely, the expiration, termination or assignment of this Agreement.

14. Relationship of the Parties. This Agreement is a commercial contract between Subscriber and American Home Systems and the relationship of the parties hereto is that of independent contractor. Nothing in this Agreement will be deemed to make the Parties partners or joint venturers or in any way imply any duties by one Party to the other except as expressly provided in this Agreement and neither Party will by virtue of anything in this Agreement be liable for the obligations of the other Party whether hereunder or to any third party. This Agreement binds the Parties and their permitted successors and assigns. No Tenant or other person will be entitled to rely on this Agreement.

15. Assignees and Subcontractors of American Home Systems shall have the right to assign this agreement to any other person, firm or corporation without notice to Subscriber and shall have further right to subcontract any services which it may perform. Subscriber acknowledges that this Agreement, and particularly those paragraphs relating to American Home Systems' maximum liability, liquidated damages, and third party

Initial: American Home Systems _____ Subscriber JS

indemnification, insure to the benefit of and are applicable to any assignees, or subcontractors, or both, and that they bind Subscriber with respect to said assignees, or subcontractors, or both with the same force and effect as they bind Subscriber to American Home Systems.

16. Trademarks. Subscriber acknowledges that the names, marks, trademarks and logos of American Home Systems, EchoStar, the DISH Network, EchoStar Communications Corporation and its Affiliates, the Programmers, the titles of programs contained in the American Home Systems Programming, and any variations incorporating them ("Marks"), are the exclusive property of their respective owners, and Subscriber has no and will acquire no proprietary rights to the Marks by reason of this Agreement. Subscriber has and will have no rights to use the Marks except at the times and in a manner expressly communicated to Subscriber by American Home Systems and the owner of a particular Mark. Subscriber will not publish or disseminate any material that violates this paragraph or any restrictions imposed by American Home Systems, the owner of a particular Mark or a Programmer.

17. Choice of Law; Venue; Consent to Jurisdiction; Arbitration. The relationship between the parties and their present and future Affiliates, including without limitation all disputes, controversies or claims, whether arising in contract or under statute, shall be governed by and construed in accordance with the laws of the State of Utah, applicable to contracts to be made and performed entirely within the State of Utah by residents of the State of Utah, without giving any effect to its conflict of law provisions. The parties hereby agree that venue and jurisdiction in Utah is appropriate for all claims and controversies arising out of, or in any way related to, this Agreement. Any and all disputes, controversies or claims between Subscriber and American Home Systems arising out of or in connection with this Agreement, which are not settled through negotiation, shall be resolved solely and exclusively by binding arbitration in accordance with both the substantive and procedural laws of Title 9 of the U.S. Code ("Federal Arbitration Act") and the Commercial Arbitration Rules of the American Arbitration Association. In the event of any conflict between the Federal Arbitration Act and the Commercial Arbitration Rules of the American Arbitration Association, the Federal Arbitration Act will control. Arbitration proceedings shall be initiated by written notice from the initiating party to the other party stating the initiating party's intent to initiate arbitration ("Notice of Arbitration"). The Arbitration shall be conducted in the City and County of Salt Lake City, Utah by a panel of three arbitrators who shall be selected as follows: (i) one arbitrator shall be selected by the claimant(s) within 30 days of sending the Notice of Arbitration; (ii) one arbitrator shall be selected by the respondent(s) within 30 days of the claimant(s) notifying respondent of the identity of claimant's arbitrator; and (iii) the third arbitrator shall be selected by the arbitrators chosen by the claimant(s) and the respondent(s) within 30 days of their appointment. The decision of the arbitrators shall be final and binding on the parties and any award of the arbitrators may be entered and enforced as a final judgment in any state or Federal court of competent jurisdiction in the United States. The parties agree that, in no event, shall the arbitrators' decision include a recovery under any theory of liability, or award in any amount, not expressly allowed under this Agreement. The cost of any arbitration hereunder, including without limitation the cost of the record or transcripts thereof, if any, administrative fees, and all other fees involved, shall be paid by the party(ies) determined by the arbitrators to not be the prevailing party(ies), or otherwise allocated in an equitable manner as determined by the arbitrators. Nothing contained herein shall limit or restrict the rights of either party and/or its Affiliates to file a Notice of Arbitration and/or bring a request for injunctive relief against the other party.

18. Entire Agreement. This Agreement, together with all Addenda, exhibits and schedules thereto, constitute the entire Agreement between the Parties, and supersedes all previous understandings, commitments or representations concerning the subject matter of this Agreement. All such previous understandings, commitments or representations concerning the subject matter of this Agreement are set forth herein. Each Party acknowledges that the other has not made any representations other than those contained in this Agreement. Except as provided in this Agreement, this Agreement may not be amended or modified, and none of its provisions may be waived, except by a writing signed by an authorized officer of the Party against whom the amendment, modification or waiver is sought to be enforced. If any portion of this Agreement is held to be unenforceable, then the remainder of the Agreement will survive and will be construed as well as possible to reflect the intent of the parties.

19. Force Majeure. American Home Systems shall be excused from performance, and shall not have any liability to Subscriber or any other person or entity, with respect to any failure of American Home Systems to perform its obligations under the provisions of this Agreement if such failure is due to a Force Majeure event including without limitation any labor dispute, fire, flood, earthquake, riot, legal enactment, governmental regulation, Act of God, equipment failure, cable cut, any problem associated with the construction, use or operation of satellite(s), transponder(s) or related systems such as uplink facilities or equipment, interference from other communications systems, solar flares or other such anomalies, degradation or interruption of protection systems, the failure of a Programmer to make its programming available, any problem associated with any scrambling/descrambling equipment or any other equipment owned or maintained by American Home Systems or others, action or order of any judicial, legislative, governmental or quasi-governmental authority, or any cause beyond American Home Systems' reasonable control.

20. Limitation on Damages. IN NO EVENT WILL AMERICAN HOME SYSTEMS BE LIABLE TO SUBSCRIBER, OR ANY PERSON CLAIMING THROUGH SUBSCRIBER, FOR ANY LOSS OF PROFITS, LOSS OF BUSINESS, INDIRECT, CONSEQUENTIAL, PUNITIVE, EXEMPLARY, SPECIAL, INCIDENTAL OR OTHER SIMILAR DAMAGES, WHETHER FORESEEABLE OR NOT, INCLUDING WITHOUT LIMITATION ANY PAYMENT FOR LOST BUSINESS, FUTURE PROFITS, LOSS OF GOODWILL, REIMBURSEMENT FOR EXPENDITURES OR INVESTMENTS MADE OR COMMITMENTS ENTERED INTO, CREATION OF CLIENTELE, ADVERTISING COSTS, TERMINATION OF EMPLOYEES OR EMPLOYEES SALARIES, OVERHEAD, EQUIPMENT OR FACILITIES INCURRED OR ACQUIRED BASED UPON THE BUSINESS DERIVED OR ANTICIPATED UNDER THIS AGREEMENT. IN NO EVENT SHALL AMERICAN HOME SYSTEMS HAVE ANY LIABILITY TO SUBSCRIBER FOR ANY OUTAGE OR DISRUPTION IN AMERICAN HOME SYSTEMS PROGRAMMING IN EXCESS OF THE APPLICABLE AMOUNT THAT WOULD HAVE BEEN CHARGED TO OPERATOR FOR SUCH PROGRAMMING DURING SUCH TIME OF OUTAGE OR DISRUPTION. IN ADDITION, AMERICAN HOME SYSTEMS SHALL HAVE NO LIABILITY TO SUBSCRIBER FOR ANY ACT OR OMISSION OF ANY PROGRAMMER OR THIRD PARTY PROVIDER OF SERVICES IN CONNECTION WITH AMERICAN HOME SYSTEMS' DELIVERY OF PROGRAMMING.

Initial: American Home Systems Subscriber *JS*

21. General.

21.1. No Implied Waiver. Except as expressly provided in this Agreement, no failure or delay by either Party to exercise any right, power or privilege under this Agreement will operate as a waiver; nor will any single or partial exercise of any right, power or privilege preclude any other or further exercise thereof or the exercise of any other right, power or privilege. All rights and remedies granted in this Agreement will be in addition to other rights and remedies to which the Parties may be entitled at law or in equity.

21.2 Successor Interests; Assignment. This Agreement is binding upon the heirs, legal representatives, successors and permitted assigns of American Home Systems and Subscriber. Subscriber shall not assign this Agreement without the prior written consent of American Home Systems which consent shall not be unreasonably withheld. By way of example and not limitation, American Home Systems may reasonably withhold consent for reasons such as creditworthiness of the proposed assignee, or if the assignee is a competitor of American Home Systems. Because this Agreement is made by American Home Systems in reliance on the financial, business and personal reputation of Subscriber and its ownership and management, any change in control of Subscriber shall be deemed an assignment requiring American Home Systems' consent hereunder. If American Home Systems denies consent for any reason, Subscriber shall have the option to terminate this Agreement and pay American Home Systems 20% of the average of the last three months invoices for American Home Systems Programming multiplied by the number of months remaining in the Initial or any Renewal Term ("Buyout"). If Subscriber assigns this Agreement in contravention of this Section, American Home Systems may, at its option, continue this Agreement in full force and effect, or immediately terminate the Agreement in which event Subscriber shall pay the Buyout referenced above upon demand.

21.3 Survival. The following provisions shall expressly survive the expiration or termination of this Agreement 8, 11, 12, 13, 17, 14, 15, 19, and 23. All other provisions of this Agreement that by their nature contemplate obligations that would reasonably be expected to continue beyond the end of the Term to give effect to the intent of the Parties will survive the expiration or termination of this Agreement.

21.4 Construction. Each of the parties acknowledges that this Agreement has been fully negotiated by the Parties with assistance of counsel and, therefore, no provision of this Agreement will be construed or interpreted against any Party because such Party or its legal representatives drafted such provision.

21.5 Headings. This Agreement's section headings are for convenience only, are not to be deemed part of its substantive provisions, and are not to be considered in its construction or interpretation.

21.6 Counterparts. This Agreement may be executed in multiple counterparts, each of which will be deemed an original. All such counterparts together will constitute one instrument.

SCHEDULE 1 TELEVISION SERVICES Bulk Programming Services Agreement

1. Equipment. The television programming for the entire property will be received by three individual 30" dishes to be installed on the clubhouse roof. The exact location of the 30" dishes to be determined at the time of installation, so as to allow ideal placement for operations. Signal is then distributed and controlled via the headend equipment to be installed inside the clubhouse. Pedestals and Control Housings are installed throughout the property to complete distribution of television service.

2. Channels. The following channels shall be distributed as part of the bulk agreement to each unit which maintains a certificate of occupancy: A&E, Court TV, Sci-Fi Channel, TNT, CCTV-9, E! Entertainment Television, Spike TV, TV Guide Channel, Comedy Central, Lifetime, TBS, USA Network, C-Span, CNBC, Headline News, The Weather Channel, C-Span2, CNN, NASA, ABC Family, Disney Channel (East), Nickelodeon / Nick at Night (East), TV Land, Cartoon Network, Disney Channel (West), Nickelodeon / Nick at Nite (West), ESPN, ESPN2, ESPNNews, TV Games Network, ESPN Alternate, ESPN2 Alternate, Horse Racing TV, Discovery Channel, History Channel, The Learning Channel, Food Network, Home & Garden Television, The Travel Channel, Country Music Television, MTV, MTV2, VH1, Documentary Channel, BYU TV, Angel One, Eternal Word Television, Network Trinity Broadcasting Network, Beauty & Fashion Channel, ISHOP, Resort & Residence, Drive TV, Jewelry Television, Shop NBC, Healthy Living Channel, Men's Channel, Shop at Home, Home Shopping Network, QVC, TV Outlet Mall, FSN Rocky Mountain.

3. Digital Programming. Add-on packages are available to all tenants. Any add-on packages are received through the Digital Programming of American Home Systems. The tenant shall be required to pay a one time set-up fee and place a fully refundable deposit per "set top box" or "receiver" in order to receive digital programming. The tenant is to be billed separately for their digital programming subscription. Listed below are digital programming packages currently available.

Initial: American Home Systems _____ Subscriber JS

DIGITAL PROGRAMMING SERVICES
March 1, 2004
(Subject to change)
ELIGIBLE DIGITAL PROGRAMMING PACKAGES:

A. BASIC PROGRAMMING:
AMERICA'S TOP 60 - \$24.99 per month per Digital Subscriber

Lifestyle Entertainment

A&E, Comedy Central, Court TV, E! Entertainment Television, Lifetime, Sci-Fi Channel, Spike TV, TNT, TBS, USA Network
News / Information
C-Span, C-Span2, CNBC, CNN, Headline News, NASA, The Weather Channel

Shopping

Home Shopping Network, QVC, Shop NBC, Shop at Home, Beauty & Fashion Channel, Men's Channel, America's Collectibles Network, Healthy Living Channel, ISHOP, Stuff TV, TV Outlet Mall

Family

ABC Family, Cartoon Network, Disney Channel (East & West), Nick at Night (East & West), TV Land, Family Net, EWTN

General Sports

ESPN, ESPN2, ESPN Alternate, ESPN2 Alternate, ESPNNews, TV Games Network

Education / Learning

History Channel, The Learning Channel, Discovery Channel, Food Network, Home & Garden Television, The Travel Channel

Music

Country Music Television, MTV, MTV2, VH1

*** Public Interest Channels may also be available ***

AMERICA'S TOP 120 - \$34.99 per month per Digital Subscriber
INCLUDES AMERICAS TOP 60, PLUS THE FOLLOWING:

Sports (in market only):

ESPN Classic, The Speed Channel, Sports Alternate 1, Sports Alternate 2, Sports Alternate 3, Sports Alternate 4, Comcast Sports Network, Fox Sports Net Chicago, Fox Sports Net Pittsburgh, Fox Sports Net Rocky Mtn, Fox Sports Net Cincinnati, Fox Sports Net Detroit, Fox Sports Net South, Fox Sports Net Florida, Fox Sports Net Southwest, Sunshine Network, Fox Sports Net Midwest, Fox Sports Net West, Fox Sports Net New England, Fox Sports Net West 2, Fox Sports Net New York, Madison Square Garden, Turner South, Empire Sports, Fox Sports Net North, NESN, Fox Sports Net Arizona, Fox Sports Net Northwest, Fox Sports Net Bay Area, Fox Sports Net Ohio

Lifestyle Entertainment

BBC America, BET, Bravo, FX, Galavision, Game Show Network, Univision (Este & Oeste), WGN Superstation, We: Women's Entertainment, Telefutera (Este & Oeste)

Education / Learning

Animal Planet, Discovery Health

Music

Fuse, DISH CD - 32 Music Channels

Movies

American Movie Classics, Independent Film Channel, Lifetime Movie Network, Turner Classic Movies

News / Information

CNNfn / CNN International, Fox News Channel, MSNBC, Tech TV

Family

Noggin, PAX TV, Toon Disney

Blackout Restrictions apply

AMERICA'S TOP 180 - \$44.99 per month per Digital Subscriber
INCLUDES AMERICAS TOP 120, PLUS THE FOLLOWING:

Lifestyle Entertainment

Biography, Encore WAM / America's Kidz, Reality TV, Soapnet, Style

News / Information

Bloomberg Television, CNBC World

Family

Boomerang, Hallmark Channel, Nickelodeon Games & Sports

Movies

Encore Mysteries, Encore (West), Encore True Stories, Encore Action / Adventure, Encore Westerns, TMC Xtra West, Encore Love Stories, Fox Movie Channel, The Movie Channel (West)

Sports

The Golf Channel, Fox Sports Net World, Outdoor Life Network, Gol TV

Education / Learning

Discovery Home & Leisure, Discovery Kids, Discovery Times Channel, Discovery Wings, Do It Yourself Network, History Channel International, National Geographic Channel, The Science Channel, Wisdom Television, The Outdoor Channel

Initial: American Home Systems _____ Subscriber _____

Music
Great American Country, VH1 Classic

AMERICA'S "EVERYTHING" PAK - \$77.99 per month per Digital Subscriber
INCLUDES AMERICAS TOP 180, PLUS THE FOLLOWING:

HBO The Works (8 Channels)
STARZ/ENCORE (8 Channels)
Showtime Unlimited (11 Channels)
MultiMax (5 Channels)

B. DISH LATINO - \$24.99 per month per Digital Subscriber

Entretenimiento
Galavisión, Mun2, TV Chile, TV Columbia, TV Española International, Telefutura Este, Telefutura Oeste, Telemundo Este, Telemundo Oeste, Univisión
Este, Univisión Oeste, HITN
Noticieros
CNN en Español, SUR

Película
Cine Latino, De Película, De Película Clásico
Deportes
Fox Sports World, Gol TV
Educativos
Discovery en Español
Musicales
HTV, Telehit, MTV Español, Dish CD - 6 Musik Channels
Entretenimiento Familiar
Toon Disney
De Adultos
Playboy en Español

DISH LATINO DOS - \$34.99 per month per Digital Subscriber

INCLUDES AMERICAS TOP 60, PLUS THE FOLLOWING:

Entretenimiento
A&E, Bravo, BET, Comedy Central, E! Entertainment Television, Lifetime, USA Network, SITV, Spike TV, M2, TV Azteca, TNT, TBS, WGN
Noticieros
CNN, Headline News, NASA Channel, Link Media
Musicales
MTV2, MTV, 30 Audio Musik Channels
Entretenimiento Familiar
Cartoon Network, Nickelodeon / Nick at Night (East or West), PAX TV
Película
Lifetime Movie Network
Deportes
ESPN, Fox Sports (RSN) - in market, TV Games Network
Educativos
History Channel, The Learning Channel, Discovery Channel, Discovery Channel Kids, Food Network, Home & Garden Television, The Travel Channel,
Animal Planet
Religiosos
Eternal Word Television Network, Angel One, DayStar, Trinity Broadcast Network, Vision TV
Compras
Auction TV, Home Shopping Network, QVC, Shop NBC, Shop at Home, Beauty & Fashion Channel, Men's Channel, America's Collectibles Network, I
Shop, Stuff TV, TV Outlet Mall, Catalog TV, Mens Shopping Channel

DISH LATINO MAX - \$44.99 per month per Digital Subscriber

INCLUDES DISH LATINO, AMERICA'S TOP 60 PLUS THE FOLLOWING:

Entretenimiento
Bravo, WGN, F/X
Noticieros
CNBC World, BBC America, Bloomberg
Entretenimiento familiar
PAX TV, Hallmark Channel
Películas
Movie Channel Xtra West, Fox Movie Channel, Lifetime Movie Network

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Deportes
 The Speed Channel
 Educativos
 Discovery Kids, Discovery Health, National Geographic, Wisdom, DIY, Animal Planet
 Musicales
 DISH CD - 30 Audio Musik Channels

C. DISH NETWORK VALUE PAKS (per month per Digital Subscriber)

America's Top 60 Package + Locals	\$29.99
DISH Latino Package + Locals	\$29.99
America's Top 120 Package + Locals	\$39.99
DISH Latino Dos Package + Locals	\$39.99
America's Top 180 Package + Locals	\$49.99
DISH Latino Max Package + Locals	\$49.99
America's Everything Package + Locals	\$82.99
America's Top 120 + HBO/Cinemax	\$51.99
America's Top 180 + HBO/Cinemax	\$61.99

D. INTERNATIONAL PROGRAMMING PACKAGES (per month per Digital Subscriber)

Arabic Elite Pack (Arabic)	\$29.99	Kairali TV (Malayalam)	\$14.99
Arabic Enhanced Pack (Arabic)	\$22.99	Surya TV (Malayalam)	\$14.99
Chinese Plus Pack (Chinese)	\$24.99	Kairali TV & Surya TV (Malayalam)	\$24.99
Chinese Super Pack (Chinese)	\$21.99	Polsat 2 International (Polish)	\$14.99
Phoenix TV (Chinese)	\$14.99	TVN-24 (Polish)	\$9.99
BVN-TV (Dutch)	\$9.99	Polsat 2 & Radio Maria (Polish)	\$14.99
MBI - Africa (English)	\$14.99	Polish Package (Polish)	\$19.99
Channel One (Farsi)	\$14.99	Radio Maria (Polish)	\$5.00
Channel One & Tapes 1 (Farsi)	\$24.99	RTPI (Portuguese)	\$4.00
Channel One & Tapes 2 (Farsi)	\$24.99	Record International (Portuguese)	\$14.99
Farsi Super Pack (Farsi)	\$32.99	TV Globo (Portuguese)	\$19.99
Tapes 1 (Farsi)	\$14.99	TV Globo/Record Package (Portuguese)	\$29.99
Tapes 1 & Tapes 2 (Farsi)	\$24.99	Channel One Russia (Russian)	\$14.99
RFI (French)	\$1.00	NTV America (Russian)	\$14.99
TV5 (French)	\$9.99	RTVI/RTVI+ (Russian)	\$24.99
ERT Sat (Greek)	\$12.99	B4U (South Asian)	\$19.99
Antenna (Greek)	\$14.99	Zee Cinema (South Asian)	\$19.99
Mega Cosmos (Greek)	\$14.99	Zee TV, TV Asia, SET - Pick Any 2 (South Asian)	\$24.99
Mega/ERT Package (Greek)	\$26.99	Jumbo Pack 1 (South Asian)	\$44.99
Greek Package (Greek)	\$36.99	Jumbo Pack 2 (South Asian)	\$44.99
The Israeli Network (Hebrew/English)	\$19.99	Mega Pack (South Asian)	\$49.99
RAI (Italian)	\$9.99	Super Pack (South Asian)	\$34.99
Radio Maria (Italian)	\$5.00	Radio Maria (Spanish)	\$5.00
TV Japan (Japanese)	\$25.00	Sun TV (Tamil)	\$14.99
TV Japan Hawaii (Japanese)	\$25.00	Gemini TV (Telugu)	\$14.99
Arirang TV (Korean)	\$14.99	PTV Prime (Urdu)	\$14.99
Korean Basic Pack (Korean)	\$29.99		
Korean Variety Pack (Korean)	\$36.99		

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E. LOCAL NETWORKS:

DIGITAL LOCAL Networks

(May Include NBC, ABC, CBS & FOX - Additional Channels May Be Available)

\$5.99 Per Subscriber Per Month

F. PREMIUM PROGRAMMING PACKAGES:

HBO THE WORKS (8 channels) STARZ/ENCORE (8 channels)

SHOWTIME UNLIMITED (11 channels) MULTIMAX (5 channels)

(Add 2.00 for HBO THE WORKS)

Any 1 Package - \$11.99/month

Any 2 packages - \$20.99/ month

Any 3 packages - \$29.99/month

Any 4 packages - \$36.99/month

Showtime Unlimited with Starz super Pak: \$20.99/ month

HBO with Showtime: \$22.99/ month

HBO with Starz: \$22.99/ month

HBO with Cinemax: \$20.99/ month

Multi-Sport Package: \$5.99/ month

Regional Sports Networks: FOX (Arizona, Bay Area, Chicago, Cincinnati, Detroit, Florida, Midwest, New England, New York, North, Northwest, Ohio, Pittsburgh, Rocky Mountain, South, Southwest, West), Comcast SportsNet, Empire Sports, MSG, NESN, Sunshine Network.

**** (Blackout restrictions will apply to a majority of professional sports and approximately 40% of the collegiate sports programming on out-of-market networks)**

G. A-LA-CARTE PROGRAMMING:

The Outdoor Channel \$1.99/Month

Bloomberg Television \$1.99/Month

H. HIGH DEFINITION PROGRAMMING:

\$9.99/Month

ESPN HD, HD Net,

Discovery HD, HD Net Movies

I. ADULT PROGRAMMING:

Extasy \$27.99/month

Fantasy \$22.99/month

Playboy \$14.99/month

TEN \$22.99/month

Applicable Fees:

In addition to the amounts due for Eligible Digital Programming, Subscriber agrees to pay the fees referenced below as applicable. American Home Systems reserves the right to increase or modify these fees, or add additional fees in the future. A \$4.98 per month DISH Video-on-Demand Fee will be charged to tenant for each DISH Player-DVR model 510 or model 522 receiver activated on tenant Account. A \$4.99 per month Additional Outlet Programming Access Fee will be charged to Tenant for each receiver (other than the primary receiver) activated on a tenant Account. Fees for Pay Per View programming ordered by a tenant. Smart Card Replacement Fee \$50.00 Change of Service Fee \$5.00 (per transaction) Restart Fee \$25.00 (per tenant) Pay-Per-View Automated Fee \$1.00

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SCHEDULE 2
BROADBAND SERVICES
Bulk Programming Services Agreement

Service. American Home Systems programming or Bulk Programming will include the ability for each tenant to have access to 3mbps of download throughput, 256kbps of upload throughput, upon completion of the project. System capacity within the project is 10mbps to each tenant. During the project construction the bandwidth will be scaled or phased in to each tenant. The estimated bandwidth scale is 1.5 mbps during the first phase; 3 mbps during the second phase. During the third phase American Home Systems may opt to increase the bandwidth up to 4.5mbps. Minimum throughput is based upon system utilization throughout the property and will be monitored 24 hours a day. Guarantee of minimum throughput levels are not available due to the constant fluctuation of utilization throughout the system. This system is not designed for the support of high volume or commercial grade servers. The system is designed as a "residential system," meaning that high level of volume that indicates server related activity will be monitored and controlled to preserve the integrity of the system for all of its users.

Additional Services. Additional services, higher bandwidth and additional throughput are available on an individual tenant basis. Separate contracts between American Home Systems and the Tenant will be required in order to provide added services. Pricing for such services will be quoted per tenant based upon need.

Service Level Agreement. Upon project completion, American Home Systems will maintain functional service for no less than 20% of a 120 consecutive day period. In the event that American Home Systems fails to perform as outlined in this agreement, Subscriber may deliver to American Home Systems written notice to correct said failure to perform. American Home Systems shall correct such non performance within 30 days or shall be considered to be in default of this agreement, and Subscriber may; (a) terminate the agreement and secure services from another provider (b) contract with another provider to correct the deficiency and charge these costs back to American Home Systems. Said charges must be normal and customary as evidenced by no less than two written bids.

SCHEDULE 3
BULK AGREEMENT PRICING
Bulk Programming Services Agreement

American Home Systems Programming or Bulk Programming as detailed throughout this contract is provided to the "Subscriber" for the amount of \$42.20 per month per "Tenant" which includes any current taxes. Taxes or fees placed upon the service by federal, state, or local governments or institutions may vary over time and any increases or decreases will be added to or deducted from the monthly charge.

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